delicate balance within this process, particularly with respect to essential administrative decision-making outside the normal review and evaluation associated with the electoral process, no single interest could be allowed to place other interests at a disadvantage. The Government also pointed out that while the nature of the work performed by public service employees was often unique in most ways, the unique nature of the employer remained constant, in that the Government was subject to scrutiny. Lastly, the Government stated that continuance of the right to withhold services by health care workers would place these interests at an unacceptable advantage and priority over those whose legitimate health care needs must be met by the system, for which there was no acceptable alternative, and as such would compromise the decision-making process relating to the provision of health care. This situation had been altered only to the extent that an alternative to the withdrawal of services had been provided and the Government considered that this was an effective compromise which would permit proper representation of employee interests within a framework that complied with international standards.

C. Information obtained during the mission

46. In the course of the mission I had the opportunity of discussing the various issues involved in this case; first, in Ottawa, with representatives of the Canadian Labour Congress (CLC) and the National Union of Provincial Government Employees (NUPGE), and secondly, in Edmonton, with representatives of the Alberta Union of Public Employees (AUPE) and its component divisions. Discussions were also held with the Assistant Deputy Minister of Labour and other provincial government officials. In addition to the oral submissions that were made by the parties, voluminous documentary evidence was communicated to me in support of the arguments put forward by them.

47. From all these discussions it was clear that the three main issues causing concern to the unions as a result of the enactment of Bill 44, which amended both the Public Service Employee Relations Act of 1980 and the Labour Relations Act, were the curtailment of collective bargaining rights for public-sector employees and the manner in which the arbitration procedures functioned, the further restrictions that Bill 44 placed on the right to strike of public employees and the exclusion of certain employees from the bargaining unit. Several other issues, which also formed part of the complaint, were also examined in detail and will be dealt with later.

(a) Collective bargaining and arbitration

48. The claim of the unions was that the introduction of Bill 44 had been a clear and deliberate attempt to place further restrictions on the collective bargaining rights of provincial government employees. In addition, the result of Bill 44 had been to destroy

any credibility in the fairness and impartiality of the arbitration system, the only dispute-settlement mechanism available to this category of workers.

49. Much information was obtained concerning the manner in which collective bargaining takes place between the Alberta Union of Public Employees, as the certified bargaining agent covering 12 separate divisions of public employees (approximately 38,000 employees), and the Crown in the Right of Alberta, as employer. Under section 50 of the Public Service Employee Relations Act, in the event of a dispute arising, if the the Public Service Employee Relations Board is satisfied that the parties to the dispute have failed to make reasonable efforts to conclude a collective agreement, the Board may direct the parties to continue collective bargaining. Section 51(1)(c) of the Act permits the Board to establish an arbitration board if it is satisfied that not only are there additional items which should be referred to arbitration but also that it is the appropriate time to refer the matter to an arbitration board.

50. At the time the mission took place collective agreements had been concluded in respect of eight out of the 12 divisions of the AUPE; the four groups in respect of which no agreement had been reached being nurses, economic staff, social workers and teachers.

51. The chief negotiator for the AUPE explained that Bill 44 had been enacted following the discontent of the Government at the awards granted by 12 separate arbitration boards in 1983. These arbitrations had been preceded by a decision of the Public Service Employee Relations Board that there had been a failure on the part of the employers to bargain in good faith. The current round of negotiations, commenced in January 1984 for the biennium 1984-85, had taken place in the context of the new atmosphere created by the enactment of Bill 44 and the employers demonstrated an aggressive attitude at the bargaining table. The failure of negotiations led to a request being made in April 1984 by the union for arbitration but this was rejected by the Board. In July 1984, following the failure of mediation, the Board referred the main, or master agreement, to arbitration.

52. Evidence was also submitted concerning the negotiating process which the unions claimed was frustrating and time-consuming. The Public Service Employee Relations Board often served to delay or prevent references to arbitration. In one case involving some 14,000 administrative and clerical workers, negotiations had commenced in January 1984; the Board had, on no fewer than three occasions, rejected an application for arbitration on the grounds that it was "untimely and inappropriate". This was followed by an application to the court which, in March 1985, upheld the Board's discretion- ary power to establish an arbitration board and stated that the Board's decision in the present case was not "patently unreasonable". It was only after the lapse of at least 18 months from the commencement of negotiations that arbitration was obtained and, as the unions pointed

out, the question of retroactivity of wage increases was itself a matter of negotiation.

53. More specifically, as regards the arbitration process, the unions expressed considerable concern over the practical application of section 48(2) of the Public Service Employee Relations Act which limits the subject-matters that may be referred for arbitration. The Public Service Employee Relations Board has jurisdiction to determine whether any particular claim falls within the list of non-arbitral items set out in this provision. In the view of the unions this provision conferred upon the employer the unilateral right to determine terms and conditions of employment. They claimed that all matters covered by this provision should fall within the scope of bargaining and arbitration since they did not entirely concern questions of management prerogative.

54. Examples of matters that had not been considered arbitral by virtue of section 48 included the right of an employer to contract out work of the bargaining unit, questions concerning hours of work and shift work, certain leave periods and the calculation of overtime (section 48(2a)); questions of job evaluation, creation of job descriptions, questions of equal pay for work of equal value (section 48(2b)); selection, transfer, promotion, training, the provision of training in the safer operation of equipment, etc. (section 48(2c)). In a recent case (December 1984) the Public Service Employee Relations Board had determined that a union's proposal to protect the positions of laid-off employees by requiring an employer to give notice of intended lay-offs was non-arbitral because it limited employer discretion. The unions, accordingly, claimed that these examples showed that the Board gave a broad interpretation of section 48(2) in order to protect the managerial prerogative of the employer.

55. Furthermore, the unions claimed that, even where items in dispute were referred to arbitration, the discretion of arbitrators was curtailed by the requirement that they take certain matters into consideration. These criteria are set out in section 55 of the Act, and in particular, oblige arbitrators to give special consideration to statements of government fiscal policy. In the unions' view, these provisions were introduced in 1983 in response to the series of arbitration awards which the Government had criticised as being too generous. Some recent statements of fiscal policy issued by the Government were made available to the mission. According to the unions, arbitrators were required to promote government fiscal policy and, accordingly, the results of arbitration were a reflection of that policy. In other words, such control of arbitral decision-making meant that the Government was, in fact, legislating results for itself as employer. Arbitrators were thus prevented from exercising the degree of independence that was necessary to constitute an adequate substitute for collective bargaining.

56. In this connection, a number of recent arbitration awards were made available to the mission. From these it was clear that the arbitration boards involved had given careful considerations to the

provisions of section 55(a) and (b) and had explored at length the conflicting roles of government as the determiner of provincial labour fiscal policy, and as employer. In some cases, the board had, in fact, not considered it necessary to take account of the optional provisions contained in section 55(b) of the Act. In one case, in May 1984, the arbitration board had stated that it did not find the government fiscal policy useful since, inter alia, it did not prescribe the exact amount of the increase.

(b) Excluded employees

57. The mission also heard evidence concerning the exclusion, by virtue of section 21(1) of the Act, of certain categories of employees from the bargaining unit for the purpose of collective bargaining. The recent amendments under Bill 44 had broadened the range of persons denied the right to engage in collective bargaining. Some of these categories had previously enjoyed this right. It was recalled that section 21 substantially provides that persons employed who have or exercise management responsibilites or duties or who are primarily engaged in the administration of personnel policies or pesonnel programmes, shall not be included in any bargaining unit.

58. In the view of the unions, the exclusion of such employees was not justified and the amendment, under Bill 44, had removed the right to collectively bargain from a number of groups of employees who had been granted that right by the Public Service Employee Relations Board under the previous statute. The Governmment had used its legislative authority to reverse a series of decisions of the Board. For example, the Board, in one case, had held that employees in occupational health and safety programmes and organisational development programmes and activities were not within the scope of "personnel policies or programmes" defined in section 21(1)(b) of the Act. The Board, in its decision, had stated that personnel, in the sense described, encompassed policies or programmes concerning the recruitment of candidates, the hiring, the appointment and promotion of employees, or the classification, evaluation, discipline or discharge of employees. The unions submitted further examples of cases in which the amendments of Bill 44 denied the right to belong to a bargainging unit to groups of workers, or individual officers, to whom that right had been recognised by the Board. According to the unions, over 400 persons had been denied the right to collective bargaining by the amendments to section 21.

(c) The right to strike

59. The mission also heard submissions from the unions concerning the overall denial of the right to strike imposed by section 93 of the Public Service Employee Relations Act on those employees to whom the Act applies. According to the unions, the Government had sought to justify this denial by stating that, although all the employees concerned did not provide essential services, they

were so closely linked to those providing essential services as to make it reasonable that they should be treated in the same way; that there was no alternative supply for these services; and that these employees were in a special position to place more pressure on the Government than other citizens.

60. The unions claimed that there was no evidence of close links between essential and non-essential persons and, more importantly, that the withdrawal of labour by non-essential persons would not adversely affect the provision of essential services. Nor was there any evidence that there was no alternative source of supply for the services provided by the employees affected. Moroever, the unions stated, the same rationale had not been applied in the private sector in cases where no alternative source of supply for many services was available.

61. At meetings with representatives of the provincial Government of Alberta, the issues that had been brought to the attention of the ILO and discussed with the mission, were explained in detail. The government representatives explained to the mission that the response by the private sector to the dramatic decline in the economy had been constructive, and the claims of the public-sector unions that they were being selected for special, unfavourable treatment were unique to that category of workers.

62. As regards the collective bargaining process, the government representatives explained that either party had the right to veto matters that were suggested for reference to arbitration. Those which the Public Service Employee Relations Board had excluded from those parts of the master agreement with AUPE in respect of which arbitration had been sought concerned exclusively management rights. The Government conceded, however, that the definition of management rights was a complex question.

63. In this connection, I suggested to the government representatives that the Public Service Employee Relations Board, by refusing to consider certain specific issues as arbitral, was itself arbitrating on these issues. Where arbitration was fundamental in a non-strike situation, it seemed anomalous that the Board, which was a procedural body, should be seen itself to be acting as arbitrator on certain issues. Such a procedure was certain to destroy the unions' faith and confidence in the Board. I further indicated that it seemed that the Government's use of the legislative process to deal with collective bargaining had also led to a loss of confidence by unions in the bargaining system.

64. As regards arbitration itself, the government representatives indicated that, from the limited experience that the Government had of arbitration of interest disputes, there had been no evidence of misuse of the provision (section 55 of the Act) requiring arbitrators to take account of provincial fiscal policy. There was no way of knowing what attention arbitrators paid to the section, but,

in any event, the fiscal policy provided wide scope for arbitrators. Examples of government fiscal policy were given to the mission.

65. On the question of exclusions under section 21(1) of the Act, as amended, the Government explained that 260 employees in all were affected by the amendment. These were mainly involved in the personnel policy area and only about 12 in the field of safety and health had been excluded from the bargaining unit.

66. Concerning the denial of the right to strike, I informed the Government generally that the Committee on Freedom of Association was likely to express some concern about the provisions in the legislation on this matter in the light of its stated principles. The government representatives took note of this and informed me that certain issues concerning the right to strike for public employees were presently before the court.

67. I also brought to the attention of the Government the question, also a concern of the unions, of the lack of prior consultation with the unions on legislation concerning matters affecting them or their members. In response, the government representative informed me that any failure to consult on such matters would be caused by the emergency of the situation and not from any systematic policy not to consult. Even on issues that were urgent, public hearings would take place in Parliament, but normally legislation was the result of lengthy and constructive discussions with any parties that would be affected.

(d) Other issues

68. During discusssions with the AUPE, I was informed that, although that organisation had initially feared that the use of experienced out-of-province negotiators might have been restricted by section 74(1), the provision as it stood was not a problem. The provincial government representatives explained that this provision had been introduced solely to deal with the practical difficulties which had arisen in the past, when out-of-province negotiators had not been able to be contacted during negotiations or, even at the time of settlement, for signature of an agrement. Given that there appeared to be no serious problem with section 74(1) in practice, I expressed my hope that the parties would be able to discuss its application if, in the future, any problems might arise in this respect.

69. It was explained to the mission that section 87 of the Labour Relations Act (providing for only one strike or lock-out vote with respect to a dispute) had been introduced in reaction to a strike in 1982 by nurses at the Banff Mineral Springs Hospital during which one of the trade unions involved had disputed the results of a pro-strike vote. The Government also pointed out that, under this provision, the unions could meet and discuss possible strike action as often as they wished, but could only apply for one strike vote

supervised by the Labour Relations Board. Both sides agreed that there appeared to be no problem with the present situation in practice.

70. It was explained to the mission, in relation to section 102.2(2) (providing for a Labour Relations Board supervised vote on the acceptance by employees of a settlement in a dispute) that the Disputes Inquiry Board was a form of binding mediation set up to examine particular disputes. The provision addressed the question as to whether union executives were free to accept awards or whether individual union members should decide this at a vote and it has not been used as yet.

71. During discussions with the union representatives, it was made clear to the mission that the effect of section 105(3)'s introduction of an offence for the mere threat of illegal strike action had added to their fears as to the real purpose behind Bill 44. They stressed that the danger of this provision was compounded by the fact that the strike action had been broadly defined in the legislation. The Government, on the other hand, pointed out that there were many Labour Relations Board decisions which clarified the definition of strikes. It also stressed that this provision stemmed from the principle of fair collective bargaining in that the threat of illegal action did not contribute to the resolution of a particular bargaining issue or negotiations in general. I pointed out that "persons acting on behalf of the bargaining agent" were also covered by this broad provision. The Government explained that section 105(3) had not been used and that it would be up to the Labour Relations Board, when faced with the application of this provision, to highlight any drafting difficulties regarding the position of union agents.

72. As regards the allegation relating to section 49 (introducing a 90-day delay before the filing of further certification applications) of the Labour Relations Act, it was explained to the mission that, under the Labour Relations Act, the Labour Relations Board was empowered to grant a collective bargaining certificate in three sets of circumstances: firstly, when satisfied that a majority of employees in the unit were paid-up union members having selected the trade union to be their bargaining agent; or secondly, when satisfied that a majority of employees in the unit had applied for union membership and paid a fee (or "deposit") not longer than 90 days before the date of the application for certification, or thirdly, after conducting a vote. Before the amendment only 30 days had applied to fee-paying employees. The union representatives felt that this time extension was yet another example of the real intent of Bill 44. The Government explained that section 49 was aimed at situations where there was not a constant organising drive by trade unions for the purposes of collective bargaining certification. This amendment had been introduced to remove any uncertainty as to a union's real strength in the bargaining unit and to avoid the possible abuse of certification proceedings as, for example, a defence to organising drives by other unions in the same bargaining unit. The Govenment pointed out that since this amendment there had been no evidence of

its impact on a trade union's ability to organise and apply for certification. Since a union's own constitution would set out the time limit for the lapse of fee-paying applicants' membership, any procedural problem that section 49 might raise for unions could possibly be avoided by simple amendment of their constitutions. In addition, it was pointed out that the Labour Relations Board had the discretion to conduct a vote even if a majority (51 per cent) of employees in the bargaining unit had indicated its selection of a trade union as its bargaining agent.

73. The union representatives told me that the amendment to section 132 concerning successor rights had no labour relations rationale. The Government explained that the amendment was a reaction to a court decision which had interpreted the previous provision too broadly, thus enabling successor rights to bind employees in "other related activities"; the position on successor rights was now clarified in the Act and the Labour Relations Board only had a discretion, not an obligation, to determine what rights, privileges and duties carried on where a question arose under the provision.

74. From information obtained during the mission concerning section 117.94 of the Labour Relations Act and section 92.2 of the Public Service Employee Relations Act concerning withdrawal of the check-off, it was clear that the complainant's initial allegations related to a draft provision which had not provided for notice and the right to appeal to the appropriate board. The union representatives acknowledged that there was no problem at the moment with sections 117.94 and 92.2 as drafted and currently in force since they had not been utilised. The Government stressed the fairness of the notice, appeal and time limit aspects of the present section; it nevertheless acknowledged that the possibility existed for an employer to suspend all employee check offs in a situation where only one employee had withdrawn his services. It considered that in such cases the appropriate board would have to decide whether an illegal strike had taken place and, if not, order the employer not to go ahead with suspension of the check-off.

75. During discussions on the withdrawal of the right to strike from hospital workers (section 117.1 of the Labour Relations Act), the AUPE representatives emphasised their concern over the indiscriminate nature of section 117.1 in that non-essential staff were covered by the strike ban. This has been discussed in a more general context in some detail above. Evidence was put forward from hospital clerical staff to the effect that their job description and duties did not differ from clerical work carried on outside the hospital system and could not be described as essential. The Government pointed out that there was much uncertainty, both at the national and international levels, as to what was an "essential service". It was explained that the Provincial Government decided to clarify the situation through legislation rather than through Labour Relations Board decisions or arbitration decisions. The Government stressed that only small groups were affected by section 117.1. After it was pointed out to

the Government that in some specific cases the international bodies had been very clear in defining the concept of essential services, the question of possible abuse was raised. The Government explained that this question was before the courts in two jurisdictions, namely the appeal of an Alberta Court of Appeal decision to the Canadian Supreme Court (challenging Bill 44 on grounds of violation of the Canadian Charter of Rights and Freedoms - to be heard in October 1985) and an AUPE appeal to the Alberta Court of Appeal which has been stayed pending the afore-mentioned Supreme Court decision.

D. Concluding remarks

76. The complaints lodged against the Government of Alberta fall into two groups. A number of them appeared to indicate that recent legislative changes, in particular Bill 44 had changed the process of collective bargaining and submission to arbitration. This it was alleged was in clear breach of ILO principles applying to a structure where limitation on the right to strike is balanced by free access to binding arbitration. Others were individual points of detail. These taken together it was suggested presented serious obstacles to freedom of association and free collective bargaining. Together the two groups of complaints were felt - and the feeling was strong and genuinely held - to form a coherent policy aimed at weakening the public service trade union. I feel it would be helpful to the Committee on Freedom of Association if I summarised the position as I saw it treating each of the groups separately and then assessing the overall position.

Collective bargaining and arbitration

77. Bill 44 has made several changes to the structure of bargaining, and recent practice has led to the feeling that major limitations have been imposed and damage done. The system as it is now working raises these issues to which the Committee's attention is specially drawn:

(a) the system denies public service employees who are covered the right to strike. It offers in its place access to binding arbitration;

(b) the access to arbitration is limited by a jurisdictional clause (section 48(2)). That clause is in effect the equivalent of a management rights clause commonly found in a collective agreement. Two questions were raised:

(i) the drafting of the statute enables the adjudicating body to take a wide view of management rights. In such instances there will be a strong counter argument raised by the trade union since the exercise of such rights will undoubtedly, on

many occasions, raise the issue that a trade union feels properly falls within the ambit of bargaining;

(ii) the procedural methods adopted put the jurisdictional issue in the hands of the Public Service Employee Relations Board. This has the effect of taking from the arbitrator, seized with problems arising from the break down of negotiations, some of the issues in dispute. The trade unions do seem to be hampered by this duality.

A study of arbitration awards indicates that the application of these provisions has produced results that narrow considerably the arbitrator's jurisdiction. It appears that the system, which it will be recalled is aimed at balancing the lack of the right to strike, is narrowing the issues that are deemed arbitrable. It is a matter that calls for careful attention.

(c) The addition within the statutory rules governing the work of the arbitrator set out in section 55 of the duty to consider "any fiscal policies that may be declared from time to time in writing by the Provincial Treasurer". It appears from what I was told that it is the potential impact of this clause that is feared. It is difficult to see the effect of the clause, taken at face value, on the practice of arbitration. It cannot be seriously contended that such fiscal policy would not be considered by an arbitrator without such direction. The dangers are, however, there:

(i) an arbitrator aware of the precariousness of the profession may give paramountcy to this one provision. Although it has to be said that this realistically is a theoretical danger, such a problem exists whether the position is statutory or not;

(ii) the Government may issue its fiscal policy in such a form, for example, as a pay increase norm. That would undoubtedly raise the impact of the particular criterion that is being considered. It would seriously fetter the freedom of the arbitrator. Indeed it would prove to change the concept of independent arbitration. Such intervention should be directly, rather than indirectly, statutory. The fiscal policies I was shown show no sign of such interference. They state clearly and succintly general economic factors of concern to the Government. Awards studied cannot be said to show any misuse of this section to destroy independence.

(d) exclusions from the process of the Act have been recently extended. This increases the number of public servants who lack the protection of the system. The facts are clearly set out in the evidence given by the parties and summarised above. The numbers under the Public Service Employee Relations Act are not excessive. Whilst it would be possible to argue about the

validity, under ILO standards, of a few categories there is no flagrant neglect of the appropriate principles.

78. Attention must be given, however, to the exclusion of health care workers from the parallel bargaining structures secured by the Labour Relations Act. That exclusion is widely drawn and gives too little attention to the important qualification of "essential worker". Its width gives real cause for concern.

Individual items

79. These have been set out in detail above and the views of the parties recorded. They can be partially grouped:

Four involve statutory changes to legal structures. Undoubtedly these changes make the trade unions' position less favourable, hence the reason for the complaints. They do not appear, however, to involve significant fetters on trade union rights. The Committee will be able to judge them from the views expressed; I found little to add.

(a) s. 74(1) - Labour Relations Act

Requires a duly authorised representative for collective bargaining to be resident in Alberta. It was made clear that the legislation does not debar the trade unions seeking assistance in bargaining from persons resident outside the Province.

(b) s. 87 - Labour Relations Act

Allows only one strike or lock-out vote. This restricts certain previously allowable trade union tactics but does not prevent sufficient polling to determine the position prior to calling for a vote.

(c) s. 49(1) - Labour Relations Act

Where a certification ballot is lost there is provision now for a 90-day moratorium. This affects the current practice of signing members on a short (30 day) basis. No doubt it will lead to a change of tactics.

(d) s. 132 - Labour Relations Act

Where a business or enterprise changes hands there has been automatic transfer to the new employer of the collective bargaining rights and duties. This provision now allows the Board to intervene. Since it is only likely to do so where difficulties are anticipated the provision appears merely to regulate and expedite normal practice. There was no indication

that this provision would be used to change previous grounds for intervention.

(e) s. 1(W. 1) of the Labour Relations Act was never promulgated.

80. Three issues require separate comment.

(a) s. 102.2 - Labour Relations Act

This provides the power to put the recommendations of a Disputes Inquiry Board to the workers concerned after 10 days of issue. Calling for such a vote is seen as a denial of the right of the trade union officials to manage their own union. It does not, however, deprive individual workers of their rights.

(b) s. 105 and s. 106 - Labour Relations Act

The crime of threatening an illegal strike created by these provisions needs careful consideration. It appears to put employees and trade union officials in some jeopardy. Two problems arise:

(i) the definition of a strike is by no means certain and precise. In many instances it is possible that the matter could only be determined by a court. An employee or trade union official either has his conduct widely fettered (fearing possible but not certain transgression) or acts in good faith, believing the strike to be lawful and subsequently finding that it is not. It seems essential that an individual who has no subjective guilt (i.e. knowledge or belief in the illegality) should be protected;

(ii) the question of the authority of individuals to act on behalf of the trade union also may arise. Again it is to be hoped that clarification will be undertaken to avoid uncertainty.

(c) s. 117.94 - Labour Relations Act and s. 92.2 - Public Service Employee Relations Act

These provisions provide that where illegal strike action takes place the employer may suspend the deduction of union dues from employees' pay and their remission to the trade union. This is an instance of fear that the provisions may be used unfairly. The statute appears to allow the stopping of all dues in the unit consequent upon the action of one individual. We were told that such response was most unlikely, except in the instance of specially selected key workers. Again, it is important to note that there may be circumstances where the trade union itself is trying to prevent or end the illegal action. Retaliatory measures in these circumstances would not appear to be fair. Again it is a matter, once aired, that can be dealt with by clarification of the exact scope of the provision.

General considerations

81. Consultation: The complaints relate to a period when the perceptions of the Government and the public service trade union were markedly divergent. Routine consultation on matters such as health and safety appeared to have continued unaffected. However, the Government's determination to act quickly as a result of the major downturn in economic activity meant that consultation on the legislative changes in Bill 44 were almost entirely restricted to a public hearing before a committee of the whole legislature. Since the legislation affected procedures in which the Government and the trade union played a joint part, it is unfortunate that more time was not found for consultation. It would appear that now the urgency of the economic pressures has abated, the process of consultation can be re-established. At the very least this will enable misconceptions to be ironed out before changes are promulgated.

82. Attitudes: It was clear that the trade union believed that it had been singled out for a concerted attack on its position and rights. The steps taken by the Government, both in their obvious intent to restrict monetary rises and the individual changes, viewed in the worst light, gave a basis for the formation of such a view. Whether these fears and the harshest reading of the legislative changes reflect what were intended is not easy to determine. I saw little objective evidence to support this pessimistic view although I accept that the fear was genuine.

83. Two aspects of the underlying problem should be mentioned.

1. It is important and practically sensible to review the questions raised as to fears of ways in which the legislation may be used to seriously impede the trade union in carrying out its bargaining role. Many of these, it seemed, could be resolved by an internal understanding secured, for example, by an exchange of letters.

2. The second is somewhat more complicated. The procedures appear to have changed the perceived independence of both the Public Service Employee Relations Board and the process of arbitration. The reasons for this are set out at the beginning of this section. It is vital that consideration be given to ensuring that the independence of arbitration is maintained and seen to be valued.

84. The establishment of better relationships between the parties is desirable and even possible given the present, less alarming economic position and the increased awareness of both unions and Government of their respective responsibilities and obligations. It will not be easy to build mutual trust quickly, but if attention is jointly given to the problems that were disclosed to me better relationships should be attainable. It is clearly in the interests of both parties to make efforts to this end and to eliminate the fears that exist at present of a disregard of ILO principles.

IV. Case of Alberta - No. 1234

A. Introduction

85. It was in a communication of 19 September 1983 that the Confederation of Alberta Faculty Associations (CAFA) presented a complaint of alleged violations of trade union rights in Alberta. The observations of the Government of Alberta were contained in a communication dated 21 February 1984.

B. The issues

86. In its communication of 19 September 1983 the CAFA alleged that a November 1981 amendment to the Universities Act denied the academic staff of the universities of the Province of Alberta the rights bestowed by Convention No. 87, ratified by Canada. The complainant explained that a new section 17(1)(d.1) empowered the Board of Governors at each university to designate those employees who shall be "academic staff members" and therefore eligible to join the faculty staff associations at each university. The provision reads as follows:

> After consultation with the academic staff association, [The Board of Governors is entitled] to do one or more of the following: (i) designate categories of employees as academic staff members at the university; (ii) designate individual employees as academic staff members at the university; (iii) change the designation made under the subclauses above.

According to the complainant, this provision gave the right to the employer to determine who should belong to a faculty association, contrary to Article 2 of Convention No. 87.

87. The CAFA explained that the present complaint was similar to previous complaints brought by various Canadian workers' associations against the Government, in particular, in 1977, the Canadian Labour Congress and the Canadian Association of University Teachers' complaint (Case No. 893, last examined in detail by the Committee in its 194th Report, paragraphs 92 to 118) and the 1981 complaint of the Alberta Association of College Faculties (Case No. 1055, examined by the Committee in its 214th Report, paras. 332-350).

88. The CAFA pointed out that it had delayed presenting a complaint to the ILO concerning the Universities Amendment Act of 1981 in order to observe what would actually occur in the initial determination by the Board of Governors of who should be designated as academic staff, and hence members of an association under the new legislation. It cited an example of such a determination: the

governing authority of Athabasca University declared its intention to designate as "academic staff members" fewer than one-third of the persons who had formerly been members of the Athabasca University Faculty Association by an arbitrary declaration of who were to be excluded on the basis that they were involved in senior management or that their activities did not meet the governing authority's definition of "academic". According to the complainant, the Athabasca University Faculty Association was able to persuade the governing authority concerned that the original definitions were unwarranted, and eventually an agreement on designation was reached. However, according to the complainant, given that the Act continued to give governing authorities the right to revoke designation at will, following consultation, the legislative threat to freedom of association continued.

89. In its communication of 21 February 1984, the Government explained that universities in Alberta were created and structured in accordance with the principle of academic freedom, the right of each individual member of the faculty of the institution to enjoy the freedom to study, to inquire, and to communicate ideas. The Government added that the principle of academic freedom must be safeguarded through appropriate institutional structures and the role of academic professionals in the management of universities had long been recognised.

90. According to the Government, from the complexity of the academic and administrative functions undertaken by such institutions stemmed the recognition that university management is the joint responsibility of the various major elements of the academic community, including faculty, administrators, governing boards and students. In particular, the faculty must play a major role in determining curriculum, subject-matter and method of instruction, research, requirement for degrees, academic appointments and granting of tenure and dismissals, since only the faculty had the competence needed for making and forming judgements on such matters. The Government cited the example of the structure at the University of Alberta where faculty members played a substantial role in administration and in setting the overall university policy; "staff members" are defined in the faculty association collective agreement as all persons who have been appointed to full-time teaching and research positions which includes all senior academics and administrators, such as the president, vice-president and deans. The Board of Governors there consists of, amongst others, the president of the university and two members of the academic staff. The General Faculties Council, which is responsible for the academic affairs of the university subject to the authority of the university, consists of, inter alia, the president, the vice-president, the deans of all the faculties, the directors of each school, the chief librarian, the registrar and elected members from all faculties and schools. The Government explained that all these persons are "academic staff" yet they are active and influential members of the very body that acts as the university board's instrument for internal college management,

which includes dealing with questions of tenure, salaries and promotions and the hearing of appeals and disciplinary matters.

91. The Government, therefore, concluded that within the university environment traditional employer/employee or managerial/non-managerial distinctions did not apply. All interest groups active within the institution played a role in its management, including the designation of "academic staff", because the Board of Governors comprised significant staff representation. The Government stressed that the Universities Amendment Act attempted to create a framework within which dialogue regarding more traditional conditions of work issues could take place, while at the same time recognising the unique nature of the universities. In particular, the Act designated the Board of Governors as the final authority and, secondly, the Act required "consultation" which the Government interpreted as including full consultation enabling the persons involved to have reasonable, ample and sufficient opportunity to express their views.

92. Referring to the example cited by the complainant, the Government explained that in early 1983 the Athabasca University Governing Council declared its intention to designate as "academic staff members" fewer than one-third of those persons who were formerly members of the Athabasca University Faculty Association. The Governing Council had felt that many professional staff were involved in senior management positions and their activities did not fall in the Governing Council's definition of "academic"; as a result of consultation between the Governing Council and the Faculty Association, an altered scope of designation had been reached, with the result that many of the persons involved - whose designations had been changed - had been redesignated as "academic staff members". According to the Government, this example proved the effectiveness of consultation as required under the Universities Amendment Act, in particular in view of the fact that the Governing Council had recognised that fragmentation of the professional staff into small bargaining units was not an advantage to the University.

C. Information obtained during the mission

93. During discussions with representatives of CAFA, two points were emphasised. First, the union was trying to have consultations, in good faith, with the employers (the Boards of Governors) in an effort to overcome the restrictive nature of s. 17(1)(d.1); such informal consultations had, in fact, worked in the Athabasca situation referred to in the written complaint. Secondly, CAFA stressed its concern that there was no right to appeal a designation of academic staff made by the Boards of Governors under s. 17(1)(d.1). CAFA considered that a possible solution to the situation would be to include provisions in the legislation for third party arbitration on the question of designation, such as exists for collective bargaining

deadlocks. I noted that this was a useful suggestion since, in most cases, the job descriptions indicated those members of the university staff who were involved in teaching and research and those who were employed in managerial tasks.

94. The Government pointed out that the Athabasca situation had been particularly tense since the campus had, at the time of the complaint, just been transferred from Edmonton to the northern town of Athabasca (after which the university had been named) to continue its "open university" curriculae. According to the Government none of the three other Alberta universities had had problems, and the employees of the University of Alberta (in Edmonton) had indeed been surprised at the complaint because they had no trouble in negotiating with their Board of Governors the question of academic staff. Nevertheless, the Government recognised that the legislation did not address the radical differences in the four universities of the Province. I pointed out that, although no problems were occurring at present with the legislation, CAFA wanted some form of machinery to protect against situations such as had occurred in Athabasca. To this the Government replied that since the other universities had managed to arrive at designations, no major change in policy could be envisaged. I indicated that informal machinery such as a letter of understanding would perhaps suffice.

D. Concluding remarks

95. The issue here is a simple one. The power given to the employer to designate staff as academic or not gave a high degree of control over the nature and size of the bargaining unit. Industrial relations in universities, which have a large degree of participation and consultation, is of an individual nature. Relationships have been excellent but the designation power led to a serious problem in Athabasca University, a body which because it concentrated upon "distance learning", that is to say students not on campus, has a special staff structure. That problem has been satisfactorily resolved but the Staff Association has been alerted to a weakness in the law.

96. There is no doubt that a unilateral power to designate does potentially put the trade union at a serious disadvantage. All that is being sought is access to independent arbitration of disputed designation. This appears to be a necessary safeguard to protect the integrity of the bargaining unit. It seems most unlikely that the machinery will often be used for the relationship appears to be good. Consideration could, accordingly, be given to the introduction of the simple safeguard that is being sought by the union.

V. Case of Ontario - No. 1172

A. Introduction

97. The complaint of the Canadian Labour Congress (CLC), on behalf of its affiliated organisations the National Union of Provincial Government Employees (NUPGE), the Ontario Public Service Employees Union (OPSEU) and the Canadian Union of Public Employees (CUPE), was contained in a communication dated 15 November 1982. The CLC supplied additional information in communications dated 15 December 1982, 16 February and 28 October 1983 and 10 January 1984. The World Confederation of Organisations of the Teaching Profession (WCOTP) presented its complaint, on behalf of its affiliates the Canadian Teachers' Federation and the Ontario Teachers' Federation, in a letter of 8 February 1983 and further information in a communication of 7 March 1983. The Service Employees International Union (SEIU) presented its complaint in a letter dated 6 April 1984. The Government sent its observations in communications dated 25 April 1983 and 7 June and 16 October 1984.

B. The issues

98. In its initial communications the CLC alleged that new Ontario legislation, "the Act respecting the restraint of compensation in the public sector of Ontario and the monitoring of inflationary conditions in the economy of the province" (known as Bill 179), violated Articles 3 and 4 of Convention No. 87 and Article 4 of Convention No. 98. The Act came into force in late 1982 and covered employees of the Ontario Public Service, all Ontario municipalities, municipal and provincial corporations, commissions, boards and agencies including universities, colleges, hospitals and health boards. In particular, the CLC alleged that of the Act took away the right of the workers covered to organise and bargain collectively because it allowed the Provincial Government to extend, arbitrarily, collective agreements for a 12-month period during which it could unilaterally determine employees' wage increases. In addition, according to the CLC, the Inflation Restraint Board established under the Act had been given sweeping powers to resolve disputes without reference to the unions or employees concerned.

99. The WCOTP, in its communication of 8 February 1983, stated that Bill 179 constituted an unjustifiable interference with bargaining rights. It pointed out that Bill 179 overrode the usual collective bargaining process prescribed in various specific Provincial Acts by imposing legislated limits on the wages of public sector employees, including teachers, because it took effect "notwithstanding any other Act, except the Human Rights Code, 1981 ...". The WCOTP further stated that no grave national emergency

existed in Ontario such as to justify this substantial restriction on the fundamental right to collective bargaining, the Government's professed commitment to the reduction of inflation not being a sufficient reason for this suspension by legislative action.

100. According to the additional information provided by the CLC on 16 February 1983 the Act in fact had become law on 15 December 1982 with retroactive operation as from 21 September 1982 and applied also to privately owned, para-public sector companies contracted to or funded by the Provincial Government, for example, nursing homes, ambulance services, garbage contractors as well as to certain private charitable organisations and non-government agencies such as the Art Gallery of Ontario and the Botanical Gardens (section 6). The complainant stated that the coverage of the Act might further be extended by regulation by the Lieutenant Governor in Council, without legislative discussion (section 25).

101. The CLC explained its dissatisfaction with the Act as follows: the Act imposed a 5 per cent increase on the compensation received by employees concerned for at least a one-year period (called "the control year"), regardless of the rate of inflation and the value of wage and benefit settlements in the private sector (section 12); it "rolled back" or expropriated, without compensation, the existing contractual rights of employees under collective agreements which extended beyond 1 October 1983 and limited the increase in compensation and monetary benefits payable to such employees under such agreements (sections 8, 9, 10, 11 and 12); it removed the right to strike or to binding arbitration in so far as such activities related to efforts to obtain monetary benefits in excess of those dictated by the Act (section 13); it appeared to allow the parties to a collective agreement to amend non-monetary issues of that agreement without providing a mechanism for such amendment because the right to strike and the right to binding arbitration were removed (section 15); it prevented a union from negotiating a first agreement with an employer where the certification of the bargaining unit had occurred after 21 September 1982 because employees could only strike or obtain binding arbitration on non-monetary issues (section 13, in conjunction with Ontario Regulation 57 of 21 January 1983 made under the Act whereby first agreements made after 21 September must comply with the 5 per cent increase in compensation laid down in the Act); it discriminated against public sector employees by subjecting them to the above restrictions whereas private sector employees were not so restricted. The complainant pointed out, in addition, that even if the parties to a collective agreement had agreed to an increase in wages or monetary benefits in excess of that permitted by the Act, the Inflation Restraint Board - consisting of appointed officials of the Ontario Government - could issue an order preventing the parties from implementing their agreement (section 21 of the Act). In addition, the orders of the Board might be filed with the Supreme Court of Ontario so that they had the force of a judgement, thus allowing the Government to enforce them through any of the judicial methods of enforcement, such as imprisonment and fines.

102. According to the CLC, such restrictions on collective bargaining as listed above violated Article 4 of Convention No. 98 and Article 7 of Convention No. 151, and the lack of disputes settlement machinery infringed Article 8 of Convention No. 151. Moreover, the CLC considered that Article 3 of Convention No. 87 was violated because of the alteration, by legislation, of the conditions of work over a certain period of time and the removal of the unions' possibility to act through negotiation. The CLC pointed out that under section 2(d) of the Canadian Charter of Rights and Freedoms, incorporated as part of the Federal Constitution in 1981, all persons had the right to freedom of association in Canada; in view of the new legislation, public servants and other individuals covered by the Act in Ontario were now denied freedom of association.

103. The WCOTP, in its communication of 7 March 1983, recalled that, under the Ontario School Boards and Teachers Collective Negotiations Act 1975, a collective bargaining process had been established according to which - if initial negotiations between teachers and their employing boards failed - the following action could be taken: initial fact-finding, mediation, voluntary binding arbitration, final offer selection, strike or lock-out. According to the complainant, free collective bargaining under this process had not resulted in inflationary wage pressures; in fact, in every quarter since 1978, the rate of teachers' salaries had fallen below the rate of inflation producing a cumulative decline in purchasing power of more than 7 per cent.

104. In addition, the WCOTP listed its principal criticisms of the new legislation as follows: in cases where negotiations relating to the 1981-82 contract period were continuing, Bill 179 terminated negotiations, declared the previous agreement to be still in force until the first anniversary following 1 October 1982 (called "the transition period") and imposed a wage increase not to exceed 9 per cent. Agreements already in effect and expiring before 30 September 1983, were deemed to be extended for a period of 12 months (again, "the control year"), with a wage increase of 5 per cent. According to the WCOTP, Bill 179 also forbade the payment of any merit award, service-related increment, long-service bonus or allowance in respect of successful completion of a training programme or course of education, regardless of whether such payments were provided for in collective agreements, if the effect would be to increase total remuneration to a level above $35,000 per annum. This extension by legislation of collective agreements eliminated the possibility of negotiation even on non-monetary items, such as conditions of work, and, since strikes were not permitted during the life of a contract, Bill 179 amounted to denial of the right to strike; thus, affected employees would have no way to make any changes to their working conditions.

105. Lastly, the WCOTP criticised the membership and procedures of the Inflation Restraint Board set up under Bill 179 - in particular the lack of appeal of its decisions - as well as the wide powers conferred on the Lieutenant Governor in Council. The WCOTP stated

that where the right to strike was removed, it was imperative to replace it with an adequate dispute resolution mechanism - Bill 179 left affected employees with no such mechanism.

106. In its communication of 28 October 1983, the CLC referred to a recent decision of the Supreme Court of Ontario (Broadway Manor case) and the Government's public announcement of its intention to extend the duration of its control programme by legislation at the beginning of November 1983. The decision, dated 24 October 1983, ruled that section 13(b) of Bill 179 was invalid because it infringed the right to freedom of association - which included the right to change bargaining agents, to bargain collectively and to strike - which was guaranteed under the Canadian Constitution. Only this section of the legislation was held to be unconstitutional because it restricted collective bargaining over non-compensation matters which, according to the Court, could not be justified as being reasonably necessary to control wage increases. On 10 January 1984, the CLC sent certain documentation referring to the replacement of Bill 179 by new draft legislation (known as Bill 111) which, if enacted, would take effect as of 1 October 1983.

107. On 6 April 1984 the Service Employees International Union presented its submissions against Bill 179 reiterating the above-mentioned points for dissatisfaction with the legislation (it removed the right to change bargaining agents, to bargain collectively on non-monetary as well as monetary matters and the right to strike or resort to interest arbitration for a broadly defined public sector) and adding that the legislation is not in harmony with Convention No. 154.

108. Referring to the importance of the independence and autonomy of parties to the collective bargaining process and the voluntary negotiation of collective agreements recognised by the Committee on Freedom of Association as fundamental aspects of Convention No. 98, the SEIU claimed that Bill 179, by interfering with existing provisions of freely negotiated collective agreements, constituted an unnecessary and unacceptable interference in the results of free collective bargaining and contravened Convention No. 154. It cited the example of the Sensenbrenner Hospital employees who were awarded an 11 per cent overall pay increase in the summer of 1982 by a three-man interest arbitration board and some of whom - since they were among the lowest paid workers in the hospital sector - were awarded a supplementary award in October 1982. On 2 November 1983 the Inflation Restraint Board ruled that the special wage increases contained in the supplementary award were null and void to the extent that they exceeded the 5 per cent limit prescribed by the Act, and ordered that any wages received by the 72 employees concerned in excesss of the prescribed increase were to be repaid to the hospital. In January 1984 the Board had refused a request made by the SEIU that it recommend, under section 17(5) of the Act, that the employees of the Sensenbrenner Hospital be exempt from its application. According to the SEIU, there had not been any

recommendations or exemptions granted to workers under these provisions of the Act.

109. Lastly, the SEIU criticised the Government's statements that conditions of work other than compensation were not disrupted by Bill 179, that non-monetary aspects of a compensation plan might be made under section 15 of that Act, that the right to select a bargaining agent was only delayed for at most one year and, most importantly according to the complainant, that although the scope of collective bargaining had been temporarily narrowed it still covered trade-offs between wages and benefits and the determination of non-monetary terms and conditions of employment. The SEIU alleged that this last justification was entirely inaccurate and unfounded especially in view of the Act's suspension of the obligation to bargain in good faith as required under the Labour Relations Act.

110. Responding to the complaints in its communication of 25 April 1983, the Government stated that its adoption of the new legislation was a responsible and necessary action, taken only after consideration of a wide range of restraint options to overcome the worst recession since the Great Depression. According to the Government, in 1981 and the first half of 1982 public sector wage increases were higher than private sector settlements in Ontario and there was evidence that administered prices - prices set or directly authorised by ministries or public agencies - were a major factor perpetuating inflation.

111. The Government pointed out that the compensation restraint programme provided for a temporary (in most cases, only one year) constraint on wage increases of up to 5 per cent or 9 per cent, allowing conditions of work other than compensation to be changed by mutual agreement (section 15 of the Act). It stated that special provision was made for workers with low incomes (section 12) and emphasised that the Lieutenant Governor in Council could exempt compensation plans from the Act (section 25). According to the Government, trade-offs between wages and benefits could be made with the permission of the Inflation Restraint Board under section 14, and it listed examples of such trade-offs.

112. As regards the alleged infringement of Convention No. 87, the Government emphasised that the legislation in fact favoured worker organisations in one way because workers with collective agreements were automatically entitled to a 5 per cent wage increase whereas other workers could receive less (section 12(1)(d)). For workers already represented wishing to change certified representatives, the Government admitted that the extension of collective agreements under the Act would delay this for, at most, one year, but pointed out that under the normal collective bargaining system such a change was in any case also subject to a time-limit - of 90 to 120 days, for example under the Labour Relations Act. As for the alleged limitation on the unions' freedom of action, the Government stated that this was incorrect: while the scope of negotiations had been temporarily restricted, the collective bargaining system remained in place and

unions were free to organise their activities, the right to strike and to binding arbitration only being delayed temporarily. An example of this freedom of action was the case of groups which had been certified before 21 September 1982 but which had not attained their first collective agreement. Under Regulation 57/83 made under the Act, such groups could use all of the normal collective bargaining procedures - including strike action - to arrive at first collective agreements on condition that the agreement provided for a compensation increase of 5 per cent for a 12-month period commencing between 1 October 1982 and 1 October 1983 and that the provisions of the whole agreement were substantially comparable to those of employees in related labour markets.

113. As regards the alleged infringement of Conventions Nos. 98 and 151, the Government stated that the Act did not discontinue the voluntary negotiation machinery but merely prolonged collective agreements, with specified provisions for wage increases, for the period stipulated. It stressed that non-monetary terms and conditions could be altered by mutual agreement and the parties were free to agree to use mediators and arbitrators in this connection. According to the Government, there had been quite a few instances of collective bargaining resulting in the full 9 per cent being granted for the 12-month period prior to the control year under section 10 of the Act. As for the limitation on disputes settlement procedures, the Government stated that, under section 14 of the Act, the Inflation Restraint Board could arbitrate, giving decisions which were binding on the parties and also indicating its reasons although the Act did not require it to do so. Moreover, the Government pointed out that under sections 17 and 25 of the Act groups of employees could be exempted from the application of Part II of the Act; it recognised that these provisions had not yet been utilised.

114. In its communication of 7 June 1984, the Government referred to the appeal lodged against the decision of the Divisional Court of the Supreme Court of Ontario dated 24 October 1983 which held section 13(b) of the Inflation Restraint Act to be invalid. The Government enclosed extracts from Hansard containing statements made by the Attorney General of Ontario which reflected the Government's concern over "the implications of the very broad interpretation given by the Court to freedom of association".

115. In its communication of 16 October 1984, the Government again referred to the economic crisis of 1981 which had led all Canadian provinces except Manitoba to introduce public sector restraint programmes. According to the Government, 71 per cent of all agreements and 69 per cent of all employees affected by the Inflation Restraint Act had been subject to controls for 12 months only. It also presented statistics to show that after the Act had been introduced there had been a dramatic decrease in the rate of inflation.

116. As regards the negotiation of non-monetary issues under section 15 of the Act, the Government pointed out that the Ontario

Ministry of Labour had continued to offer and provide mediation services to parties covered by the Act who agreed to bargain non-compensatory issues, and negotiations had taken place on such items as grievance procedures, pupil-teacher ratios and job security. The Inflation Restraint Board had made 655 decisions and orders between 1 December 1982 and December 1983, a number of which resulted from issues which had arisen in negotiation. The Government contended that such mediation fulfilled the requirements of Convention No. 151.

117. The Government also pointed out that the Lieutenant Governor's power under the Act to terminate the application of the controls to any compensation plan had been used with respect to certain municipal employees' retirement plan (Regulation 92/83) and to exclude certain handicapped people, persons not covered by minimum wage legislation and persons who received less than 50 per cent of their expenses from a government employer (Regulations 819/82 and 844/82). Moreover, the Act required the Inflation Restraint Board to investigate price increases in government services called "administered services" referred to it by the Minister. For example, in 1982, the Board had investigated a price increase for Northern and Central Gas which had been approved by the Ontario Energy Board, and had concluded that the price increase did not comply with the Minister's criteria; the proposed price was subsequently reduced to bring it into compliance. Moreover, the Cabinet Committee on Administered Prices had maintained an increase of only 5 per cent in over half the cases submitted to it, e.g. for legal aid fees, beer prices, school-bus tariffs, tuition fees for Canadian students, provincial park fees, resident fishing licence fees and Northern Telephone Ltd. charges. Thus 92 per cent of the adminstered prices had kept within the 5 per cent increase guide-line.

118. The Government explained that the legislation which replaced Bill 179 as of October 1983 - the Public Sector Prices and Compensation Review Act (known as Bill 111) - provided for full collective bargaining of both compensation and non-compensation issues and allowed the normal strike or arbitration procedures when the parties were unable to conclude a collective agreement.

119. Lastly, the Government referred to the SEIU's allegations, stating that at no time during the operation of the Inflation Restraint Act had the right of employees to establish, join and participate fully in organisations of their own choosing been withheld. Only situations such as that which had arisen in the Broadway Manor case had been affected by the Act; in that case only certification had been delayed and certification under Ontario law was not a prerequisite to the lawful establishment of or participation in a "new" union. The Government stated that its appeal to the Ontario Court of Appeal against the Divisional Supreme Court decision in the Broadway Manor case had been heard on 4 June 1984 but the decision had not, at the time of the Government's reply to the ILO, been rendered. As for the situation in the Sensenbrenner Hospital, the Government denied that the Inflation Restraint Board had ordered a

recovery of the excess payments that had already been made, but merely referred the matter back to the parties.

C. Information obtained during the mission

120. During the mission's stay in Toronto I had the opportunity to meet representatives of the following organisations: Service Employees International Union (local 204), the Ontario Public Service Employees' Union, the Canadian Union of Public Employees and the Ontario Teachers' Federation. These meetings were followed by a meeting with a number of Government officials representing the Province of Ontario. In the course of my meetings with the trade union organisations I obtained information in the form of oral presentations and written submissions. Written submissions and documentation were also supplied on behalf of the provincial government.

121. At my initial meetings with the Canadian Labour Congress in Ottawa the problems referred to in the complaint resulting from the coming into force, on 21 September 1982, of the Inflation Restraint Act (Bill 179), had already been mentioned.

122. Since the main thrust of the arguments advanced by all the trade unions was virtually identical as regards what they considered to be a violation of their trade union rights consequent upon the enactment of Bill 179, and to some extent, the later enactment, on 10 October 1983, of the Public Sector Prices and Compensation Review Act (Bill 111), it will suffice here to summarise these arguments and the information supplied in substantiation of them.

123. I should, at this point, state that I emphasised to all the parties that no formal allegations concerning Bill 111 had been submitted to the ILO and that, strictly speaking, this legislation fell outside my terms of reference. However, since Bill 111 is directly relevant to the issues raised in the formal complaints and is the latest act by the Government in the area of public sector collective bargaining, I felt that it was appropriate to record the unions', as well as the Government's views on this later enactment and its effect on public sector bargaining. Indeed, at the time of the mission, Bill 111, itself a temporary enactment, was due to expire.

124. The principal claim of all the unions was that the enactment of Bill 179 in September 1982 not only put an end to collective bargaining, and indeed to trade union activity, for a period of almost two years, but also prevented the coming into force of collective agreements freely concluded prior to the Act. Generally, agreements that were due to expire on or after 10 October 1981 would be extended for a period of 12 months provided that compensation rates did not exceed 9 per cent. These agreements on their expiry and every other agreement would be deemed to include a provision increasing

compensation rates by 5 per cent for the ensuing 12-month period. The unions argued that it was questionable that the economic situation in the country, and more specifically in the province, justified these measures and even if there were economic difficulties there was no justification for what amounted to a virtual ban on trade union activity for the period during which the Act was to remain in force. In effect, since collective bargaining was excluded, even on non-monetary issues, there could be no arbitration, which was an accepted substitute for the denial of the right to strike in the public service.

125. The SEIU, the majority of whose 33,000 members were employed in the hospital and nursing home sector said that it had always accepted the substitution of the right to strike for the right of independent and binding third party arbitration. Bill 179, and subsequently Bill 111, showed that the Government supported neither the right to strike nor truly independent and impartial arbitration. Similar arguments were advanced by OPSEU, representing 80,000 members, who added that the 5 per cent limit on wage increases had widened the gap between lower-paid and higher-paid employees. Some 15,000 of their members employed in part-time employment, for whom protracted negotiations had resulted in a two-year agreement for a 9 per cent and 11 per cent increase in increment, had been denied the 11 per cent increase on the enactment of Bill 179. Other categories of workers had been similarly affected. OPSEU also introduced witnesses who described the effects of Bill 179 on laboratory workers and on the support staff of community colleges (approx. 5,000) who had been guaranteed, during the 1981 bargaining operation, that their wages would be increased by 20 per cent over the following three years. All of these categories had suffered under the wage controls imposed by Bill 179.

126. The CUPE emphasised that Bill 179 not only restrained compensation but eliminated the right to bargain effectively with employers over non-monetary provisions in a collective agreement. This, they added, had been criticised by the Ontario Court of Appeal (Broadway Manor case) in a decision issued on 22 October 1984, a decision that was of little practical relevance since Bill 179 had then, for all practical purposes, been replaced by other legislation (Bill 111). CUPE also emphasised that during the existence of Bill 179, workers governed by the Labour Relations Act were effectively deprived of the right to strike. In addition, the possibility of resorting to arbitration by workers governed by the provisions of either the Hospital Labour Disputes Arbitration Act or the Crown Employees Collective Bargaining Act was effectively eliminated.

127. Another point made by CUPE was that, as a result of Bill 179, they had originally claimed that the right to organise was infringed since workers could not change bargaining agents during the control period. This was another matter which has been settled by the Court of Appeal of Ontario in the Broadway Manor case. The Court held that the effect of Bill 179 was not to extend collective agreements themselves, but only to extend the terms and conditions of

such agreements. Bill 179 did not, therefore, curtail the right to change bargaining agents. As stated above, however, the decision in the Broadway Manor case was only handed down on the expiry of Bill 179.

128. CUPE provided a number of examples of some 100 agreements, concluded prior to the enactment of Bill 179, that had been "rolled back" by the Act, and explained that many low-paid workers were affected by this measure. This union also mentioned that, in the hospital sector, a close wage relationship had always existed between workers represented by CUPE and those represented by SEIU. However, the SEIU hospital members, who do exactly the same work as CUPE members, were awarded 11 per cent in a one-year contract arbitrated just prior to the institution of Bill 179, whereas CUPE members received a maximum of 9 per cent in the first year of their agreement, pursuant to the provisions of Bill 179. As a result CUPE members were adversely treated in comparison with SEIU members simply because of the luck of different termination dates of collective agreements.

129. The Ontario Teachers' Federation, which represents over 104,000 teachers employed in the publicly supported elementary and secondary schools in Ontario, also complained that Bill 179, and later Bill 111, had the effect of overriding the negotiating process established under the School Boards and Teachers' Collective Negotiations Act, 1975, as amended in 1983. In its view no economic emergency existed in Ontario to justify the enactment of Bill 179. In addition, the right to strike which teachers have in Ontario, was suspended during the control period imposed by the Act. Detailed information was supplied by the Federation showing the impact of Bill 179 on the wages of teachers in the province.

130. The Public Sector Prices and Compensation Review Act, 1983 (known as Bill 111), which replaced Bill 179 did not, according to the unions, restore free collective bargaining but imposed, in a more subtle manner, a further period of restrictions on collective bargaining. In effect, Bill 111 provided that, during a "restraint period" of 12 months, the Inflation Restraint Board was empowered to fix and monitor all changes in compensation in the same broadly defined public sector as Bill 179, in order to determine whether compensation changes complied with the fiscal policy of the province as determined by the Treasurer of Ontario. The Treasurer had announced that increases in average compensation should not exceed 5 per cent during this restraint period. Furthermore, the Government had announced that government grants and transfers to publicly funded institutions covered by Bill 111, as well as allocations to its own civil servants would provide for average compensation increases of up to 5 per cent. While compensation increases in excess of 5 per cent were possible, the Inflation Restraint Board, the Government and leaders of municipalities had made it clear that any attempt to exceed the 5 per cent guide-line would result in lower transfer payments from the province.

131. In submitting these comments on Bill 111, both CUPE and SEIU also referred to the requirement, under section 10 of the Bill, that

arbitrators take into account the "employers' ability to pay [...] in the light of existing provincial fiscal policy". According to the unions, the Government, using this device, could unilaterally determine the funding of public-sector institutions, and the reliance on the employer's ability to pay effectively meant that the Government could also unilaterally establish wage rates. Any claim of independence and impartiality of the arbitration process was also undermined. The Canadian Teachers' Federation submitted similar comments in connection with Bill 111.

132. In addition, all the unions referred to the fact that a number of a well-known interest arbitrators had rejected the criterion of "ability to pay" for public-sector wage determination. Statements made by some leading arbitrators were produced in which they referred to the "atmosphere of intimidation" which the legislation engendered and to the public statements made by the Treasurer indicating that, unless the economic policy of the Government was followed, restrictive legislation of a long-term nature would be introduced.

133. With the representatives of the Government of the Province of Ontario I raised all the issues that had been brought to my attention during my meetings with the various public sector unions. The Government representatives claimed that compelling reasons of national and provincial economic interest had led the Government to conclude that it should control wage rates in the public sector. In 1982, they explained, Ontario was experiencing recession, double-digit inflation (11-12 per cent), loss of international competitiveness and loss of jobs in the private sector (approximately 164,000 jobs in Ontario alone). The restrictions on public-sector wages contained in Bill 179 were imposed as an exceptional measure. The Bill was not intended to restructure labour legislation in the province, nor was it intended to be permanent. Bill 179 imposed wage controls for only 12 months for the majority of the employees, and only 31 per cent of the employees affected were subject to the transition period which could extend controls for two years. No employees were now affected by Bill 179.

134. The subsequent legislation (the Public Sector Prices and Compensation Review Act, 1983 - Bill 111), established a guide-line for public-sector increases for a one-year period. In the case of public-sector employees whose agreements were determined by interest arbitration, the new legislation required interest arbitrators to cost any change in the terms of collective agreements and to consider the employer's ability to pay. In the case of public-sector employees who negotiated agreements (including those who had the right to strike) the legislation required the filing of information with respect to any changes in the compensation plan. If an arbitrator determined, or the parties agreed to wage increases in excess of the 5 per cent guide-line, the legislation had no mechanism to "roll back" the wage increases thus determined or negotiated. The Government representatives added that, since Bill 111 was now at an end, no wage restraint legislation was presently in force in Ontario.

135. The Government representatives further explained that, in considering the economic situation in 1982 a number of options for action had been considered, including a national programme of wage and price controls. Because a consensus with the other provinces could not be reached on this, and because of the difficulties encountered by reason of the nature of the Province of Ontario itself as regards a possible programme covering public and private-sector workers, a programme controlling prices and wages in the public sector alone was decided.

136. The Government emphasised that safeguards were provided to protect workers' living standards. In addition to controlling prices, the rate of inflation was lowered (to less than 11 per cent during the third quarter of 1982). Since Bill 179 was introduced, inflation had continued to drop, and for the first quarter of 1985, it stood at 3.6 per cent. Public-sector job security and employment was also maintained at a time when there was much job loss in the private sector. Fair and reasonable increases were also ensured for employees covered by the legislation. In this connection, the Government supplied statistical information showing that increases under the legislation were comparable to private-sector wage increases and had in fact exceeded private-sector wage increases since the fourth quarter of 1983. Bill 179 also made provision for minimum increases, low-income earners and for wage adjustments. It also permitted newly certified unions, i.e. those certified prior to the enactment of Bill 179, to freely negotiate compensation increases for the period leading into the control period in their first agreements. The ability to change non-compensatory items of a collective agreement by mutual consent was also maintained by the Act as was eventually shown by the decision of the Ontario Court of Appeal to this effect in the Broadway Manor case.

137. Referring to the SEIU complaint that Bill 179 had suspended the right to change bargaining agents, the right to bargain collectively on non-monetary items and the right to strike or to resort to interest arbitration, the Government representatives referred to the decision of the Court of Appeal in the Broadway Manor case which established that the union was wrong in its allegations. The Court had, however, expressed some doubt that the employees could strike or resort to arbitration without actually making any decision on this point.

138. The Government added that a wide range of consultations had taken place prior to the enactment of Bill 179 and there had been a broad political consensus for its adoption. The Government had been satisfied with the results of Bill 179 and had replaced it by Bill 111 which was not an exceptional measure taken in a period of crisis. Bill 111 was intended as a further step towards a normal situation and re-established collective bargaining in the public sector. The continuing existence of the Inflation Restraint Board was merely for the purpose of ensuring its participation in current litigation.

139. As regards the requirement, under Bill 111, that interest arbitrators take account of provincial fiscal policy and the ability to pay of the employer, the Government representatives pointed out that sums transferred to public institutions had always been decided upon by the Government. Under Bill 111 the amounts were clearly stated. In cases where the 5 per cent norm was exceeded either by arbitrators or by the needs of a public institution ways could be found to provide the extra funds required.

140. Regarding the unions' concern that the Government had appeared to be constantly trying to find ways of reducing flexibility and placing pressures on arbitrators, which eroded and damaged confidence in the arbitration system, the Government representatives emphasised that arbitrators were merely asked in Bill 111 to keep certain criteria in mind. Many did not feel bound by these criteria and some 200 awards had been made in 1984/85, the majority of these exceeding negotiated settlements. Under the Labour Relations Act, a panel of arbitrators had been established for grievance disputes and it was generally from this panel that arbitrators were selected to deal with interest disputes. The Government admitted that its information on wage settlements in certain sectors (e.g. in the municipalities) was inadequate but that efforts were being made to resolve this problem.

141. On the question of "roll backs", the Government admitted that this had been seen to be harsh but again stated that they had been dictated by economic necessity. The Government also pointed out that it could not recall, apart from one or two cases, that the problem of the absence of negotiations on non-monetary items to have been a significant one.

142. The Government also admitted that there might be some longer-term effects of Bill 179, for example on job evaluation and classification programmes, but it was expected that the return to collective bargaining would resolve any anomalies that remained. It was also clear that, in some cases, employers had taken advantage of the legislation by refusing to pay negotiated wage increases. This was, however, a matter for the courts and one over which the Government had little control.

143. Referring again to the decision in the Broadway Manor case and the problem of changing bargaining agents during the one-year period of control under Bill 179, the Government explained that it had considered this matter prior to the Bill's adoption. It had been thought that it was inappropriate for a change in bargaining agent to take place during that period since the incoming union would not be able to negotiate. The Government had discussed this question with the unions whose reaction to the problem had been a mixed one. In any event, according to the Government, since the public service unions were well-established it was unlikely that any challenge would have been made during the control period. The Government recalled that newly certified unions were not affected by what was subsequently

proved - by the decision in the Broadway Manor case - to be a false problem.

D. Concluding remarks

144. An obvious feature of this complaint is that it concerns the provisions and effects of the Inflation Restraint Act, 1982 (Bill 179) which is no longer in force. Indeed, that statute was followed by Bill 111, a measure which itself is due to expire at the end of September 1985. No further legislation in this area has been proposed at the present time. It is none the less important to complete the process of assessing Bill 179 against ILO standards. Even though it is no longer in effect, apart from some residual matters remaining for technical purposes, there is still a strong divergence of views in the province as to its nature and effect. In addition, it has been suggested that some practices introduced by the legislation will continue to operate as a result of informal administrative action. This point, too, has to be considered.

145. Bill 179 was enacted to counter rising inflation. Its effect, put generally, was to impose a fairly rigid control of wages in the public sector. This was built around a "control year" with a limit of a 5 per cent increase. This was embedded in less severe controls which could be effective as a 9 per cent ceiling. The whole exercise could affect a particular bargaining unit over a two-year period. It was suggested that the Government had failed to establish that there was in fact an economic crisis. There had been insufficient research and understanding of the problem. It was also said that wage increases would have fallen year by year without legislative interference. Both these beliefs are of course matters of opinion. The basic data is not seriously in dispute. There is a marked difference of interpretation between the trade unions who made these points and the Government. It was suggested that such divergence of view should be resolved by some independent mechanism, such as the courts. It is difficult to see the necessity in principle for such a fetter upon the exercise of the political will. There is every opportunity for the matters concerned to be tested through debate in the political forum.

146. Since the public sector was being singled out for special control, on the assumption that wages in the private sector would follow the trend set, it does seem essential that there should be ample time allowed for consultation. Failure to do this might indicate that the action was indeed precipitate and partisan. There was no complaint about lack of consultation. What was said was that the views of the trade unions had no discernible effect on the attitude and actions of the Government. That is a different matter.

147. So far, these remarks relate to the political aspects of the concern expressed. The actions do raise, however, practical and

legal considerations. The most obvious is the impact the legislation had upon existing collective agreements. They were subject in many cases to amendment in particular a lesser wage increase being allowed. A lawyer can characterise such action as the expropriation of rights.

148. Such a result is difficult to avoid where a scheme of restraint is imposed which it is intended should have a speedy effect. The Government was aware of the problem and chose to apply what it regarded as "rough justice". Indeed attention was paid to attempting to mitigate some of the consequences. Most notable was some degree of protection of the first agreement, that is to say, the first agreement made after a trade union has secured bargaining rights. Such agreements often involve substantial improvements in terms and conditions. This was recognised by the leglisation and the impact of the 5 per cent delayed to allow the first agreement to operate.

149. Despite these concerns, the legislation appears to have had a greater impact on free collective bargaining than was intended or anticipated. Three aspects of this appear to be particularly important: the "chilling effect" on collective bargaining generally, damage to policies being pursued by the trade unions from bargain to bargain and the machinery for certification during the so-called "open" period.

150. Although the legislation applied only to monetary items it seems to have had an effect on matters not covered by the Act on which the parties were free to bargain. In part this was made more likely because there had been the anticipation of a switch of bargaining to non-monetary items. Some steps had been taken to prevent this being used to undermine the intended financial control. There can be little doubt that there were items adversely affected, health and safety issues spring to mind. Now the problem can be seen in the light of experience; it can be tackled should such a need arise in the future. Particular attention should be paid to the availability of the disputes resolution mechanisms so that normal relations can continue hampered only by the minimum of restrictions needed to secure the objects of the emergency measures.

151. The general objectives which the trade unions in the public sector were pursuing and which suffered setbacks are, for example, remedying low pay and seeking equality for women. Both objectives are legitimate, indeed praiseworthy. There can be no doubt that Bill 179 constituted a check to their progress. Most obvious is the use of a norm for pay increases expressed as a percentage, rather than as a flat increase. The Government accepts that this consequence occurred and points out that some steps had been taken to mitigate the result. Some of the provisions did seek to give special advantages to the lower paid: the highest were to some extent held back. Whether enough was done is in dispute. Recognition of the need to take into account such considerations when legislation is being prepared seems to be accepted. This seems to be an important point.

152. The third example of the wider effects of the legislation concerns the "closing" of the "open" period which is a feature of the Canadian industrial relations system. The legislation purported to close the open period of the control year. This was thought to deny the unions the right to gain certification. The matter was taken to the courts. Again, it is clear that the object of the provision was to secure as much industrial relations tranquility as possible during the restraint period. The question raised is whether such action was convenient and useful rather than necessary. It would need detailed knowledge of what the precise effect was during the operation of Bill 179 but prima facie the limitation appears to seek to avoid disturbance rather than secure an essential component of the limitation plan.

153. Attention was drawn to the Broadway Manor case and two comments might be useful. The decision was that the open period was not in fact closed - a distinction being made between terms and conditions which were continued and the collective agreement which did not. The decision turned of course on the precise wording of the provisions of Bill 179. In that it has narrow interest, but wider considerations arise. The case shows the importance of prior discussion of all the possible consequences of proposed legislation, that is to say, of consultation. What is decided then will be effective. On the other hand, reliance on the courts to clarify or interpret the legislation may bring changes but these will almost invariably prove ineffective since the decision is unlikely to be available during the currency of legislation which is short term. Consultation not only on the wider issues - should a provision be enacted - may merely lead to reaffirmation of the policy proposed but, on the practical consequences, what exactly is likely to happen might lead to sensible modifications being adopted.

154. One of the clearest and most important points put to us by the various trade unions was the impact the legislation has had on the regular industrial relations machinery. Various examples were given. It was felt that the employer, where his financial ability to meet trade union claims was severely limited by government fiscal policy, was unable to bargain with freedom. The scope of his flexibility might vary but his attitude was significantly altered. There were some signs of this in some of the instances put but there was too little information to enable the position in the Province of Ontario to be confidently assessed.

155. The problems the legislation and subsequent practice have posed for the important component of the system, independent arbitration, are much clearer and were put forward with much greater force. During the period when Bill 179 operated on collective bargaining, of course norms were in effect substituted for arbitration. Since then, under Bill 111, the idea of a norm, or desirable maximum increase formulated by the Government has continued. Arbitrators are given quite specific indications of the Government's view and are expected to take this into account. There are widely differing views on the effect of this practice, which

appears likely to continue. It must be true that arbitrators will always have in mind the economic background in which they are operating. Many independent arbitrators are academics but few live in such ivory towers, as is commonly supposed, as not to have a clear awareness of these factors. In the unlikely chance of this being lacking, no doubt the parties will raise the issue in their statements. On the other hand, the publication to the arbitrator of a norm may have some effect. Again empirical evidence is less than clear since, alas, it is not possible to assume that when an arbitrator says he has "taken into account" such a figure, he is indicating that he has or has not been greatly influenced by it. There are ample instances of the arbitrator expressing scepticism. To balance this it appears that several arbitrators have refused to act feeling that their freedom of action was fettered.

156. The independence of arbitration is of paramount importance. It is the feature of the system in the public sector which seeks to balance the non-existence of the right to strike. That equation is one which not all those giving evidence accept as fair or proper but that question does not arise at this time. What is important is that where that system operates, arbitration must be independent. Confidence in arbitration is easily destroyed so everything must be done to ensure that doubts as to independence should be assuaged. It is not a question of testing or challenging their validity. It is essential to see whether steps can be properly taken to strengthen independence. One significant point put concerns the appointment of arbitrators. If at all possible, this should be done by a body independent of Government, a Labour Relations Board, a court and so on, depending on the particular structure. It is a matter that would require serious consideration by the provincial authorities.

157. Finally, it is necessary to note that the way in which these remarks are to be interpreted depends very much on whether inflation restraint secured by putting pressure on the public sector in particular is to continue. It has already been noted that Bill 111 does not appear to have a successor. Continuation of the policy, if at all, will be through administrative and practical measures. Experience indicates that they can play an important part in the Government's policy. If they do, since the method adopted is informal, greater care will be essential to ensure that the damage to industrial relations structures, especially the right to seek certification, to bargain collectively and to enjoy truly independent arbitration, does not occur. The trade union apprehensions appear to run ahead of what is happening - justifiably so. Awareness of these fears and discussion of the problems should help to avoid unwitting damage to the very vital safeguards built into current Ontario legislation.

VI. Case of Newfoundland: No. 1260

A. Introduction

158. This case has its origin in a formal complaint submitted, on 3 February 1984, by the Canadian Labour Congress on behalf of the Newfoundland Association of Public Employees (NAPE) which belongs to the National Union of Provincial Government Employees (NUPGE), an affiliate of the CLC. The Government's observations in response to the complaint were contained in a communication of 29 May 1984.

B. The issues

159. On 19 August 1983 an Act (known as Bill 59) was proclaimed the object of which was to introduce amendments to the the Public Service (Collective Bargaining) Act, 1973. According to the CLC these amendments are in violation of ILO Conventions Nos. 87, 98 and 151 in three different areas: the definition of "employee" contained in section 2(1) of the Bill, the designation of "essential" employees (section 10), and the limitation placed on strike action (sections 10(12), 23 and 24). According to the CLC Bill 59 was the latest in a series of restrictive anti-union enactments introduced to control wages in the public service and limit the possibilities for strike action.

160. The Government of Newfoundland explained that, between 1973 (when the Public Service (Collective Bargaining) Act extended bargaining rights to employees of the Provincial Government) and 1983, it had become obvious that section 10 of the Act was not effective in that almost every application before the Labour Relations Board had been found by either the Board or the courts to be defective in some respect. Section 10 clearly needed to be amended to provide for the designation of essential employees whose services were necessary for the health, safety or security of the public. In addition, unions continued to apply to the Labour Relations Board for inclusion in bargaining units of management and confidential employees and, although the Board generally rejected these efforts, it was determined that the Act should also be amended to remedy an oversight in the legislation and explicitly state the exclusions. According to the Government, no amendments had been made to the basic Act prior to Bill 59. Because of preliminary discussions with various public service unions and concerns expressed regarding three particular sections, the Act had been made subject to proclamation. The Minister of Labour had contacted each of the public service unions and had invited recommendations to be submitted to the Government regarding expressed concerns. No concrete proposals or written submissions were received by the Government and, accordingly, on 19 August 1983 the amending Act was proclaimed to come into force on 1 September 1983.

(i) Exclusions from the definition of "employee"

161. The CLC maintained that the amended definition of "employee" had resulted in the exclusion of more than 2,000 government employees from membership of NAPE and prevented them from joining any other union. This group included justice department solicitors, legislative staff, middle management and consultants and could exclude a number of employees who currently had union membership with the bargaining agent that represented provincial government employees, namely NAPE. The complainant considered as particularly offensive new section 2(1)(i)(xii) which specifically prohibits people hired for programmes sponsored by Government grants and working for the provincial government from joining a union; it suspected that the provincial government would use this subsection to lay off permanent employees and hire non-union personnel to do the work of those laid off, work which had traditionally been done by members of the bargaining unit concerned.

162. In its written response to the complaint, the Government stated that the amendments to section 2 had been necessary to prevent interference by employers in trade union activities and to avoid conflicts of interest involving management staff. It pointed out that the exclusions described in section 2(1)(i)(viii), (ix), (x) and (xi) concerned high-level employees whose functions are normally considered as policy-making or managerial, or employees whose duties are of a highly confidential nature as contemplated in Article 1.2 of Convention No. 151. The Government stated that none of these employees had been members of bargaining units at the time of enactment of Bill 59, nor had the union involved ever made application for inclusion in a bargaining unit of any of these categories of employees. According to the Government, the exclusions provided for in section 2(1)(i)(xiii), (xiv) and (xv) concern persons on whom the Labour Relations Board, and not the Government, makes a determination as to the appropriateness of inclusion in a bargaining unit. These employees would be those who, in the opinion of the Board, performed management or supervisory functions, or were employed in a confidential capacity in matters relating to labour relations. In the past, in utilising these criteria the Board had taken a fairly restrictive approach to exclusions from the bargaining unit.

163. The Government stated that section 2(1)(i)(xv) allows for the exclusion of employees who, in the opinion of the Board, provide advice to the employer in relation to the development or administration of policies or programmes and that it was senior consultants who were intended to be excluded from the bargaining units under this provision. Although these employees might not be supervisors in the normal sense of the word, or have access to confidential labour relations information, according to the Government they did form an essential part of the senior management team in many government organisations and were therefore clearly inappropriate for inclusion in a bargaining unit. The Government emphasised that there

had been no decisions by the Labour Relations Board interpreting this provision to date.

164. As regards section 2(1)(i)(xii) the Government stated that this was an amendment to deal with a unique situation concerning which there had been a written agreement with the union concerned, namely that of individuals receiving social assistance from the Provincial Government, with the aim of helping them to become self-sufficient by introducing them to the workforce and of qualifying them for unemployment insurance benefits. The Government explained that many of these individuals had no work experience or job skills, thus making it virtually impossible for them to obtain employment in difficult times; they were placed throughout the province with a variety of employers, many in the private sector, in order for them to learn a skill or gain some experience so that they might find a job in the future; they were not employees in the true sense of the word since they were not required to report for work, and, if they did not, they simply returned to social assistance; the Government paid their wages and employment was for a specified period of time. The Government pointed out that the union had agreed that these individuals would not be required to pay union dues and would not be covered by collective agreements. However, in May 1983, the union refused to honour its agreement, which had led to the introduction of this legislative amendment. The Government maintained that it was clearly inappropriate for normal union hiring and recall provisions to apply to this type of unique programme; if this had been the case, the programme would have been significantly impaired, if not rendered inoperable, causing hardship for many needy people.

165. The Government's final point concerning the definition of "employee" under the amended Act was that the excluded employees did enjoy freedom of association and the right to organise. Neither did Convention No. 87 nor Convention No. 98 impose an obligation on Government to grant certification rights for the purpose of collective bargaining. Excluded employees were able to organise and negotiate their conditions of employment collectively, often on an informal basis, and often on a formal basis when the Government had voluntarily recognised certain associations and bargained with them on behalf of their membership, e.g. Newfoundland and Labrador Association of Superintendents of Education and the Newfoundland Medical Association.

(ii) Designation of "essential" employees

166. As regards the amendment to section 10 of the Act which defines the method of designating essential employees, the complainant cited the restrictions contained in subsections 1, 2, 3, 6, 7 and 8. Subsection 1 empowers the employer of employees in a bargaining unit to provide the provincial Labour Relations Board with a statement in writing as to the number of employees whom it considers to be essential. Under subsection 2, where no objection is made to this statement before the Board the number of employees specified shall be deemed to be the number of essential employees; where an objection is

made to the written statement before the Board, under subsection 3, the Board after considering the objection and affording the bargaining agent and employer an opportunity to make representations and to be heard shall determine the number of employees who are essential. Once this process is completed the employer, under subsection 7, shall name the employees in the unit who are essential; under subsection 8 the employer has the right to substitute names. According to the complainant, subsection 1 allows the employer to make a statement at any time to the Board on the number of employees it considers essential, there being no restrictions as to the number of times that the employer can make that statement. This permits the employer to participate in strike-breaking activities because, for example, an employer could designate few employees as essential in the initial stages of a strike and designate more and more employees as essential as the strike progressed so as to make strike action pointless. In addition, the combination of subsections 2, 3 and 7 of section 10 enables employers to determine that only some employees in a classification are essential while certain other employees performing exactly the same duties need not be declared essential.

167. The complainant alleged another discriminatory element in the process of designating essential employees under Bill 59: the Labour Relations Board was now restricted from operating in an independent manner because, under section 10(3), it could not increase the number of essential employees from the figure that was contained in the employer's statement. For example, when an employer designated 49 per cent of bargaining unit members as essential, for all practical purposes strikes were outlawed, and employees were prevented from taking their case to arbitration under the Act because a majority was necessary for such action.

168. According to the complainant section 10(12) also violated the rights of public sector workers; it provides that a strike vote cannot be taken until any dispute involving the determination of essential employees is settled. Thus even the polling of a union's members to get an indication of the feelings towards strike action is prohibited.

169. The complainant stated that the most repressive feature of the amendment to the designation of essential services employees was the fact that employees who had been deemed essential lost all their rights with respect to employment - they were not covered by a collective agreement and they were not covered by the basic labour standards legislation. In addition, section 10(11) allows the employer to terminate immediately the employment of an essential employee who fails to report to work, without that employee having access to any appeals procedure. Subsection 11 reads as follows: "Where an employee named by the employer as an essential employee does not report for work as required under subsection 10, the employer shall forthwith terminate the employment of that employee, unless the employer is satisfied that there are reasonable grounds for the employee not so reporting".

170. In its written observations on the question of essential employees, the Government stated that the 1973 Act did not take away the right to strike from any particular group of employees, but only from those individuals in any given bargaining unit which the Labour Relations Board might determine were necessary for the health, safety or security of the public. The Government stated that the 1973 version of section 10 had not achieved its purpose since the unions effectively thwarted the Government's applications to the Board for a determination of essential employees. At first, few strikes had taken place in areas affecting the health, safety or security of the public and those that had taken place were of relatively short duration; emergency services could be provided by management employees and, in some cases, the unions had allowed some bargaining unit members to work in emergency situations. The situation changed, however, in 1981 when the laboratory and X-ray employees took strike action. According to the Government, the union provided emergency services but not essential services, emergency services being provided only in cases where there was an immediate threat to life. Management employees were able to provide additional services so that for a period of time hospitals had been able to cope. The strike continued beyond a month's duration and difficulties arose, forcing the Government to act by introducing Bill 111 which provided for the designation of approximately one-third of the bargaining unit to provide essential services. This Act had been repealed with effect from the date of signing a new collective agreement to cover laboratory and X-ray employees and, in any case, on the date of the enactment of Bill 111, the union had called off the strike. Following the conclusion of this difficult situation, the Government had decided that the 1973 Act would have to be amended to provide a workable method of designating essential employees by an independent tribunal prior to a strike. Therefore Bill 59 introduced new essential employee provisions; employees could strike but essential services would have to be maintained. The Government explained that, under the amendment, the Labour Relations Board determined the number of employees in any particular classification that was required to provide essential services. This determination was based on the submission from the employer and provided for intervention by the bargaining agent. After the union and the employer had agreed, or the Board had determined the number of employees, the employer named the individuals and might substitute those names. This was necessary, stated the Government, so that the employer might choose employees who could do the required work since employees in the same classification might be somewhat specialised, e.g. critical-care staff or general day nurses. It also allowed the employer to substitute names of employees who had resigned, retired or taken leave of absence.

171. Regarding the allegation that the Labour Relations Board was now prohibited from operating independently, since it could not increase the number of essential employees contained in the employer's statement, the Government stated that it or the employer, and not the Labour Relations Board, had to determine the level of service which had to be provided to ensure that the health, safety or security of the public was not jeopardised. It claimed that there would be a

dereliction of public duty if the employer were to seek a lower number of employees than reasonably necessary to perform the required level of service. It pointed out that where the number of employees deemed essential exceeded 50 per cent, the bargaining unit had the right to advise the employer and the Board that every employee would be deemed essential, and thus the right to compulsory binding arbitration was available to the bargaining agent pursuant to section 29 of the Act.

172. The Government stated that, under section 10(12), strikes and strike votes which led to strikes were not permitted until the number - not the names - of essential employees had been agreed between the parties or determined by the Board. The employer could not delay the determination of the number of essential employees unilaterally since section 10(1) allowed the union to request the Labour Relations Board to order the employer to make the necessary submissions. The Government emphasised that section 10(12) did not prohibit the union in any way from polling its members to ascertain their feelings towards job action; it merely provided that a strike vote leading to a strike pursuant to section 23 could not be taken prior to a determination of essential employees. According to the Government, this was similar to a provision which stated that a strike vote could not be taken until conciliation proceedings have been completed.

173. The Government maintained that employees who were named essential and reported to work did not lose all their rights with respect to employment. Section 10(10) provided that they must report to work as if a strike were not taking place, which meant that the provisions of the expired collective agreement continued to govern essential employees. The essential employees who worked through a strike were automatically entitled to all benefits that the striking employees were able to obtain upon settlement of the strike. In addition, the Government repeated that, if more than 50 per cent of the employees in a bargaining unit were deemed essential, all employees had the right to binding arbitration. As regards the allegation that because of the designation of essential employees, strike action would prove a useless tool, the Government stated that this was a premature statement in view of the fact that no orders had yet been issued by the Board. The Government also pointed out that an essential employee who failed to report to work without reasonable grounds was subject to termination, but since the expired collective agreement continued to govern essential employees who were not on strike, the grievance provisions likewise remained in effect. Employees were always subject to dismissal for just cause and the legislation merely stated that failure to report to work without a valid excuse would be just cause. The employer's action and the employee's reasonable grounds would continue to be subject to the scrutiny of arbitrators and the courts.

(iii) Limitations on strike action

174. The third amendment introduced by Bill 59 which was the subject of the complaint concerned section 23, which now provided that employees who opt for strike action are required by law to give 38 days' (one month plus seven days) notice before they are legally able to strike. In addition, section 24 of the Act had been amended so that workers in health care institutions did not have the right to strike on a rotating basis. According to the complainant, sections 23 and 24 as they now read served no other purpose than to limit union members in their freedom to express themselves, as well as the right to strike to a particular means of striking. It pointed out that the employer, when drafting the legislation, had decided to attack solely the union since the legislation did not provide for any reciprocal provisions concerning the employer, such as lock-out.

175. Concerning the limitation on strike action, the Government pointed out that, under the 1973 Act, a seven-day notice prior to taking strike action was required. This provision had not been altered except that where strike action did not commence on the notified date, a one-month's delay was required before another notice was permitted. The Government explained that this provision had been included to prevent a union from closing an institution, such as a hospital, without actually going on strike. When a hospital was notified that a strike was to take place, operations had to be significantly curtailed and the hospital was geared down to providing only essential services whether or not the employees actually withdrew their services. The new provision required that the employees give the institution an opportunity to return to operational status for a reasonable period of time if they did not strike on the date originally intended.

176. Regarding rotating strikes, the Government stated that such action in health service institutions had been prohibited so as to avoid a situation where persons were admitted to hospital and scheduled for surgery and, with no further notice, employees of that hospital went on strike. Rotating strikes in health service institutions created life-threatening situations and, stated the Government, were completely unacceptable. It pointed out, however, that these two provisions covering the timing and nature of strike action had no effect on the right to strike or the effectiveness of job action once taken, but were reasonable limitations taken only in the interests of protecting the health and safety of the public and did not amount to an infringement of freedom of association. The Government considered that the allegation that the amendment did not include an accompanying prohibition on rotating lock-outs is difficult to understand since such action would never benefit health service institutions.

177. In conclusion, the Government stated that the amendments under examination had been made to protect the health, safety and security of the public and not intended to discriminate or interfere in lawful union activities. It pointed out that the Committee on

Freedom of Association had recognised that exclusion from trade unions and the collective bargaining process of public servants occupying managerial or supervisory positions of trust was justified. The Government maintained that the amendment to section 2(1) had excluded such employees from a bargaining unit but left them free to join associations to protect their occupational interests; such associations had been recognised by the Government and bargaining had taken place with them. As regards the other specific exclusions listed in section 2(1)(i)(viii) to (xii) the Government stated that it had no control over such exclusions since applications had to be made to the Labour Relations Board which made decisions based on established precedent and labour law principles relevant to exclusions from the bargaining unit. It pointed out that, over the past several years, most inclusions/exclusions in government departments had been settled by agreement between the union concerned and the employer with only a very few disputed positions being taken to the Labour Relations Board for a determination. As regards the allegation that the new method of designating essential employees discriminated against union activists, the Government stated that there had been no interference in union organisation and no instances of an employee having to join or relinquish membership in a trade union. According to the Government it was in the employer's interest to have employees who would perform essential services and it was employer policy not to designate union executives and officials unless they were the only individuals in the classification who were able to perform the required work. It reiterated that the amendments to the legislation concerning the timing or nature of strike action were not unnecessary interferences in the union's activities or programmes, but merely laid down preconditions to the implementation of a strike. It stated that the union was free to poll its members and conduct ballots to determine the feeling of the membership towards job action and that only the formal strike vote which culminated in a strike might not be taken until essential employees had been designated.

C. Information obtained during the mission

178. I had extensive discussions on the issues raised in this case with both the NAPE and the provincial government representatives, headed by the Assistant Deputy Minister, on the spot in St. John's, Newfoundland and in Ottawa where CLC and NUPGE representatives also spoke to me about Bill 59. Once again, the oral submissions of the parties were supplemented by extensive written submissions, handed to me in St. John's.

179. The first point that emerged during these discussions was that the healthy industrial relations climate which had reigned in the Province since the 1950s had fallen to an adversarial one. According to the union, partly due to the recession, partly in over-reaction to an increasing radicalism in certain civil service unions, and perhaps partly due to an aversion on both sides to seek interest arbitration,

the Government interferred in the collective bargaining process with Bill 59. NAPE's view was that, prior to Bill 59, responsibility for the decline in labour relations lay as much with the unions because of their radicalism as with the Goverment because of its paternalistic approach. The unions, however, could not be blamed for the "panic" of the Government in enacting Bill 59 which was utterly pro-employer in character and which would only lead to a further deterioration in labour relations. The background to the introduction of the legislation in Parliament evidences the misunderstanding between the parties at present, a point which will be referred to further on in this report.

(a) Consultations

180. The union stressed during our discussions that it had, in effect, only been given one day's notice when the draft legislation was tabled. There were no public hearings on the proposed amendments and NAPE had been under the impression that Bill 59 as a whole was subject to proclamation whereas only the three disputed areas (definition of employee, designation of essential employees and the strike provisions) were held in abeyance and gazetted at a later date. NAPE claimed that Bill 59 had eroded any previous trust that existed beween the parties and caused a situation of confrontation. According to the union, the reason for the introduction of this legislation had been clearly a growing contempt by the Government for the unions and their increasing strength as well as a lack of respect for the unions' ability to represent the interests of their members. The situation prior to Bill 59 had been satisfactory with 294 contracts having been concluded. The arbitration system and the selection of arbitrators from a panel established by the Labour Management Co-operation Committee had also been satisfactory.

181. The Government, on the other hand, explained that copies of the draft amendments had been given to the union very shortly before they were tabled in Parliament. The difficulties with the basic collective bargaining Act and with section 10 in particular had been discussed with NAPE representatives on many occasions in the past. The Government delayed proclamation of the disputed parts of Bill 59 and informed the union that it wanted to receive its suggestions on them. However, according to the Government, no written submissions were received; only a general tape-recorded description of the problems was handed in to the Ministry of Labour. This the Government took to be a lack of interest in face-to-face discussion. The provisions were then proclaimed and came into force on 1 September 1983. The Government could not explain why the union backed off at this juncture although it recognised that it may had been due to the breakdown in the informal, co-operative relations which the union had had with the Government as employer in the past.

(b) The definition of employee

182. According to NAPE, in the amendment of section 2(1) in Bill 59 the Government had effectively excluded up to 2,000 workers from union membership which some had previously enjoyed. NAPE was concerned with the exclusion from the definition of employee of persons employed in an employment opportunity programme administered by the provincial Government with its own and/or federal monies (section 2(1)(i)(xii)). The union pointed out that this exclusion from coverage of the Act does not apply to similar programmes administered by other levels of government such as school boards and municipalities. It claimed that the aim of such programmes was not to train the unemployed to enter the workforce, but to transfer them from the provincial payroll to the federal payroll. Since such persons could not join a union, it was more difficult to negotiate increases in union members' benefits, and the union felt threatened by this source of scab labour should strikes occur and the possible reduction in working time of union members. NAPE was particularly suspicious of this provision given that it has made many agreements with employers not covered by the Act (municipalities, the College of Fisheries, private hospitals) allowing employment opportunity programmes in workplaces where it represents workers. From copies of such agreements handed to me, it appeared that NAPE's only precondition for accepting non-union workers in such workplaces was the protection of the job security and benefits of its members. The union's other concern with this provision - that it denied these persons the right to join a union - was not related to an earlier agreement NAPE had had with the Government concerning non-unionisation; that agreement had only concerned persons on welfare. According to NAPE, when the Government started using these people in programmes, that understanding fell. Given that the union was prepared to represent these people on matters not connected to their rates of pay which were set under the scheme, more or less in line with the minimum wage, and would not expect them to pay dues, it felt that the Government ought to have negotiated their situation with NAPE instead of legislating them out of coverage under the Act.

183. The Government pointed out that the employment opportunity programmes were designed to enable unemployed persons to accrue the 20 weeks' workforce experience required for entitlement to federal unemployment benefits. When NAPE's position on coverage of such persons for non-collective bargaining items was put to the Government, there appeared to be further misunderstanding: the Government stated that, in 1984-85, about 600 people had been involved in the programmes and therefore not entitled to collective bargaining, whereas the union had claimed that 2,000 had been without collective agreements. Given the temporary employment of people in these unique programmes, the Government found it hard to understand why the union would be interested in recruiting these people for membership per se but did not express opposition to this possibility.

184. As regards the exclusion contained in section 2(1)(i)(xv) (persons providing advice to the employer in relation to policies or

programmes), NAPE explained that the past practice of negotiations and Labour Relations Board decisions had worked well when disputes - which were quite rare - over this type of employee arose. It feared that this amendment could be stretched to include such persons as social workers or consultants. It pointed out that the Labour Relations Board has refused to grant exemptions for the present until judicial challenges to Bill 59 as a whole are completed. The Government considered that it had only put into legislative form the criteria of the Board's past practice, namely the exclusion of managerial, confidential and policy-making employees. It pointed out that this was an exclusion specifically recognised in Article 1 of Convention No. 151. I pointed out that the union's suspicion might have been the result of a lack of communication as to the intent of this provision.

185. During these discussions on section 2(1), the Government also emphasised that there was no hidden motive behind subsection (ix) - which excludes solicitors and legislative counsel from the Act - and pointed out that they do form associations and bargain collectively with the employer.

(c) Questions concerning the right to strike

186. Section 2 of the Amendment Act of 1983 (Bill 59) repealed section 10 of the Public Service (Collective Bargaining) Act of 1973 which related to the designation of essential employees, that is to say "employees whose duties consist in whole or in part of duties the performance of which, at any particular time or during any specified period of time, is or may be necessary for the health, safety or security of the public". While the definition of essential employees remained the same after the 1983 amendment, a number of issues arose from the further amendments introduced by Bill 59 to the Act of 1973.

187. NAPE claimed that public-sector unions had always provided essential services to protect the health, safety and security of the public. It was NAPE's belief, however, that the legislation was being used to give the employer, the Government and the Newfoundland Hospital Association, an advantage in collective bargaining. NAPE representatives insisted that they were fully conscious of the need to provide essential services during labour disputes. Bill 59, however, empowered the Labour Relations Board to be final arbitrator with respect to essential services. The Board would always err on the side of caution in its decisions on essential services, thus favouring the employer. It was NAPE's contention that the Board would not appoint more essential employees than the number requested by the Government. The result was the prevention of more than half of any bargaining unit being designated as essential, thereby preventing in turn a resolution of a dispute by arbitration; it was obviously the Government's intention to eliminate the right to strike, but also to prevent disputes from being resolved through arbitration.

188. NAPE argued that it was difficult for the union to agree on the determination of essential employees since the employer refused to give it information on the total number of workers in bargaining units and their job classifications.

189. According to NAPE, the workers in liquor stores who had previously been considered essential, had had their right to strike restored, whereas the status of hospital food service workers had not changed, their right to strike always having remained intact. It was an anomalous situation when health inspectors employed by the provincial Government were considered essential but workers not working for the province but who prepared food for a number of hospitals were not.

190. The Government, according to NAPE, had always been unwilling to settle questions of essential employees through negotiation or by following alternative disputes settlement procedures. This question was one which had been going on for years and the courts and the Labour Relations Board had decided that the Government's approach had been impractical.

191. If, for example, through negotiations or by decision of the Labour Relations Board, 33 per cent of hospital support staff were declared essential, this would mean that out of a bargaining unit of 800, 265 would remain at work. To this latter figure would be added management and non-bargaining unit workers and workers of other bargaining units. In other words, a major hospital, during a strike, could have more workers available than during the peak annual leave period. It was, in addition, the practice in Newfoundland to recruit other workers to replace striking workers. Hospital support staff had, therefore, lost their collective bargaining rights through this procedure which, in addition, denied them any other disputes settlement machinery.

192. Under Bill 59, employers could select essential employees as they wished or otherwise manipulate strikes by making it difficult to deal with a dispute if a large minority of workers were deemed essential and received full pay and benefits while those on strike had their regular income interrupted.

193. Another aspect of the matter was the ability, according to NAPE, of the employer to have a small percentage of the bargaining unit declared essential and to return periodically to the Board for further increases in that percentage. Such a practice would have the effect of destroying strikes.

194. NAPE agreed that the legislation had never been used by the employer in this manner but claimed, nevertheless, that these advantages written into the legislation had a prejudicial effect on the morale of the workers and on the collective bargaining process. The belief, shared by NAPE and by the Government, is that there must be levels below which public services should not be reduced, should

not be used, either by unions or by government, to gain advantages in collective bargaining.

195. In NAPE's view, the question of essential services should be decided through negotiation between the Government and the union, or decided by an expert third party. No one should gain any advantage and essential services should be shared equally amongst the qualified members of the bargaining unit. Since the question of essential services destroys the right to strike, any bargaining unit in which the question arises must have an alternative disputes settlement procedure at its disposal.

196. NAPE also questioned the need of sections 27-29 of the Act which provide for a declaration of a state of emergency during a strike where such a strike would be injurious to the health or safety of persons, or a group or class of persons, or the security of the province.

197. The union referred to one case concerning a strike in 1981, of laboratory technologists, X-ray technologists, technicians, etc. following the failure of the Government to accept the report of a conciliation board. Although a strike was declared, the union set up an essential employees system and provided specialist skills, on a permanent basis. A renewed offer by the employer was refused by the union. The Government introduced legislation (Bill 111) declaring up to half the bargaining unit as essential, thus putting an end to the strike. In the view of NAPE, the Government could have referred the issues in dispute to arbitration or returned to the negotiating table. Instead, by introducing legislation, it destroyed collective bargaining for the unit concerned. The union thereafter signed a collective agreement and Bill 111 came to an end.

198. NAPE also argued that section 2(12) of Bill 59 denied union members the right to vote to take strike action. If the employer made an offer, the only vote that could be taken would be one to accept it, otherwise it would be illegal. The designation of essential employees should follow - and not precede - a decision to strike.

199. Another problem was that posed by section 23 of the Act, as amended by section 6 of Bill 59. Under the previous legislation of 1973, bargaining units were required to give seven days' notice of any strike. Under Bill 59, if the union did not go on strike on the date specified in the notice, 30 days had to elapse before a further notice of seven days could be given. Again, in the view of the union, this was an attempt to control collective bargaining to the advantage of the employer.

200. Section 24 of the 1973 Act was also amended by Bill 59 to prevent rotating strikes which, in NAPE's view, should not be banned. Here again, this prohibition gave the employer great influence on the union's negotiating strategy. In addition, rotating

strikes would ensure that only a portion of the hospitals in the province would be on strike at any given time.

201. In its submissions on the question of strikes, the Government explained that the 1973 Act granted this right to all workers covered by it, i.e. civil servants, hospital employees and vocational school instructors, with the exception of those who might be designated as essential. Prior to Bill 59, the employer, at the time of certification of the union, made an application to the Labour Relations Board for designation of a list of named employees. Almost every such application had been contested by the union and in some way found wanting by the courts which themselves said that the Act required substantial modification on this question. Even on one occasion, when the Board had appointed a panel of experts to designate, the court had found that this panel did not have jurisdiction to do so.

202. This unsatisfactory situation lasted for almost ten years and it was only after the strike, in 1981, of laboratory and X-ray workers during which a threat was made to call out even essential services, that amendments were introduced in Bill 59. As regards the 1981 strike, the Government added that arbitration was not provided for in the legislation nor, from an economic point of view, did the Government consider it appropriate to refer the issues to arbitration. Although the conciliation results had been rejected by the Government, it was often the union that rejected such results. In any event, the emergency legislation was enacted since there was an urgent and grave risk to the health of patients.

203. The 1973 Act had, accordingly, proved to be unworkable as regards essential services and Bill 59 had introduced amendments which were procedural rather than substantial. Instead of asking the Board to designate named employees, a number was requested. The employer could apply to the Board at any time and not, as before, only at the time of certification, most unions being in any event voluntarily recognised. According to the Government, the union's claim that the employer might make successive requests to the Board in order to increase the number and thus break a strike was a misunderstanding on its part. Not only was it not the employer's intention to do this but it was also practically impossible since there were major difficulties in convening the Board at short notice.

204. According to the Government, there had been meetings with NAPE concerning these problems but in spite of all the explanations given to them, the misunderstanding remained. No such problems, however, existed between the employer and other bargaining units, e.g. the Canadian Union of Public Employees, on these matters. Agreements as to the designation of essential employees had been reached with other unions, but NAPE who had knowledge of the employer's current proposals, had requested the Board not to proceed with hearings on them. The Government supplied the mission with detailed information on the recommendations it had made to the Board as to the percentage of essential employees that might be fixed by the Board. Since 1983,

however, NAPE had steadfastly refused to participate in the process of negotiating essential employee requirements.

205. It was important to emphasise, continued the Government, that in June 1985, section 10 of the Act was amended and a significant number of Government employees in nine specific bargaining units were excluded from the designation of essential requirement. Other government agencies or boards had identified a minimal or no essentials requirement and, in the overall government sector, it had been determined that 21 per cent (17.7 per cent including section 10 units) of the employees were essential. This group included 100 per cent of prison warders (who now had automatic access to arbitration) and others such as forest-fire suppression crews, social workers, etc. The requirement in the health-care sector was greater (33 per cent) to ensure a minimum standard of care for the sick and the aged.

206. The Government pointed out that five years ago the union would not have been prepared to accept arbitration as an alternative to its right to strike. Now it was the Government which, in the present economic situation, was reluctant to seek arbitration. Bill 59, the Government insisted, resulted from court decisions and was precipitated by the 1981 strike. Now, the Government pointed out, the rules were set and well known and this was preferable to the adoption - as was the case in 1981 - of emergency legislation in the event of a strike in an essential service. There had been no strikes in the hospital sector since 1981.

207. As regards sections 23 and 24 of the Act, as amended by Bill 59, the amendments introduced in June 1985 had repealed section 23 but had maintained the seven-day notice period in respect of hospitals and health-care institutions. If workers in these sectors did not go on strike on the date specified in the notice, a further 30 days had to elapse before another notice was given. The reason for this was to deal with the problem of sending patients home and bringing them back to hospital if the strike did not occur. The system did not exclude eleventh-hour bargaining and, in the view of the Government, there was no reason why there could not be an agreement between the parties to extend by one day the seven-day notice period if a new offer was made.

208. Concerning rotating strikes, the Government explained that Bill 59 had amended section 24 of the Act to prohibit such strikes in health service institutions only. The Act concerned the bargaining unit only, and while part of that unit could be called out on strike, there could be no question of that part striking on a rotating basis. This provision had been introduced to avoid the kind of problem that had been experienced during the 1981 strike of laboratory and X-ray workers.

D. Concluding remarks

209. Public servants represented by NAPE basically retain the right to strike. The counter-inflation measures overrode the bargaining system which remained intact for use once the special legislation had run its course. The complaint, therefore, relates to limitations which appear to have recently been introduced into the usual process of bargaining.

210. The first point raised, and it is a very important one, was that the measures in Bill 59 were never the subject of proper consultation. It is obvious to an outsider coming to Newfoundland that, although industrial relations in the public sector are not without their share of problems and some strife, there has been a good relationship between the trade union and government. This did not prevent disharmony on Bill 59. It is difficult to describe accurately the extent of consultation on Bill 59 since perceptions differed. Such contact as there was took place in an atmoshpere where the Government, having recently reviewed industrial relations was determined to seek revision built on experience. Whilst the trade union viewed the changes as a threat to its position, indeed it felt that the position had not been adequately assessed and felt threatened by the provisions of the Bill, some of which it found far from clear. It appeared to NAPE that a series of incidents over the previous few years had led to a somewhat extreme reaction which did not reflect what was really to be anticipated. The underlying confusion and suspicion were clear.

211. The Act has been in place now for some two years. Misunderstandings and hesitancies still exist. It has to be noted that very recently some important modifications have been made by an amendment Act of June 1985. This serves to underline the need for a resumption of co-operative consultations. It is still possible to detect divergent views on the meaning and intent of various provisions of Bill 59: several practical difficulties can be foreseen and both sides are looking predominantly at the possiblity of extreme reactions from the other. This is surely fruitful ground for consultation and it would seem that there is scope for jointly clarifying, tidying up and more closely defining the rules and, in the process, re-establishing a better working relationship.

212. One of the most serious points put by the union relates to the limitation on collective bargaining by amendments to the definition of employee. This has two components. Section 1(b)(xii) excludes from the crucial definition of employee, those employed in an opportunity employment programme. There was some confusion between the accounts given as to the exact coverage of this subsection. What is clear is that it excludes workers offered opportunity placements from bargaining units. This is understandable since the principal terms and conditions are governed by the terms of the scheme. However two worries remain. The trade union seeks the right to be consulted on such workers who are used in work within or connected